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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KERR-McGEE CHEMICAL CORPORATION,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Is an action brought in state court properly removed to federal court, as one "arising under" the laws of the United States pursuant to 28 U.S.C. § 1441, where the subject matter of the complaint is preempted by federal law?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to this proceeding.[1]

[1] Kerr-McGee Chemical Corporation is a wholly-owned subsidiary of Kerr-McGee Corporation. The following are affiliates of Kerr-McGee Chemical Corporation: Bikita Minerals (Private), Ltd. and Basic Management, Inc.

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IN THE

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OCTOBER TERM, 1982

KERR-McGEE CHEMICAL CORPORATION,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Kerr-McGee Chemical Corporation prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 4, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, together with the opinion in the case consolidated with this action on appeal, is reported at 677 F.2d 571 and appears in the appendix hereto at page A 1. The unreported opinion of the District Court for the Northern District of Illinois appears in the Appendix at page A 25.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 4, 1982. A timely petition for

rehearing en banc was denied on August 2, 1982. (A. 30). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions involved are set forth in the appendix accompanying this petition: Article VI, clause 2 of the United States Constitution (A. 64); 28 U.S.C. § 1441 (A. 64); and relevant sections of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* (A. 64).

STATEMENT OF THE CASE

This action involves a facility in West Chicago, Illinois, licensed by the Nuclear Regulatory Commission ("NRC") pursuant to the Atomic Energy Act, 42 U.S.C. § 2011. Kerr-McGee Chemical Corporation ("Kerr-McGee") acquired the facility as a result of its merger with American Potash and Chemical Corporation in 1967. From the 1930's until 1973, when the facility shut down, the plant processed low level radioactive ores for various purposes, including use by the United States government in atomic energy projects. The facility was first licensed by the Atomic Energy Commission ("AEC") in 1956 and has remained continuously under license by the NRC. As a consequence of forty years of processing and storing thorium and radioactive ores, the facility contains large quantities of mill tailings contaminated with low-level radioactivity which must be stabilized before the facility may be decommissioned pursuant to NRC regulations and licensing procedures. The decommissioning proceedings for this facility are currently in progress before the NRC.

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[2] The action of a circuit court of appeals directing a remand to a state court is reviewable in this Court. *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U. S. 464 (1947).

Although the regulation of the field of radioactive hazards has been occupied by federal law and regulations,[3] the State of Illinois (the "State") filed this action in the Circuit Court of DuPage County, Illinois, alleging that the presence of mill tailings at the inoperative Kerr-McGee facility violates state pollution control statutes and regulations pertaining generally to the disposal of wastes. Though the complaint ostensibly is aimed at non-radioactive hazards, the allegations and relief sought are directed at the federally licensed and regulated mill tailings at the facility. (A. 33). The State complaint seeks to regulate the radioactive wastes by ordering them moved outside West Chicago (A. 35), but the NRC draft environmental impact statement relating to this facility, issued in May, 1982, recommends that the wastes be encapsulated on the present facility site. (NUREG-0904).

Kerr-McGee removed this action to the United States District Court for the Northern District of Illinois, pursuant to 28 U. S. C. § 1441, on the ground that federal law preempted the subject matter of the State's claim and, therefore, since federal law supplants state law in this area the complaint "arises under" federal law. (A. 53). The State moved to remand this action to state court. Chief Judge McGarr denied the State's motion, holding that: 1) the regulation of radioactive

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[3] As the Seventh Circuit decision acknowledged, the Atomic Energy Act, 42 U. S. C. § 2011, from its inception, recognized the regulation of radioactivity "as the exclusive province of the federal government." (A. 14). That act created "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency." *Siegel* v. *AEC*, 400 F. 2d 778, 783 (D. C. Cir. 1968). Federal preemption of the regulation of radioactive materials is necessitated by the unique nature of the subject matter and the need for uniformity of regulation. *Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143, 1153-54 (8th Cir. 1971), *aff'd mem.*, 405 U. S. 1035 (1972); *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U. S. 1 (1976).

materials by the State is preempted by federal law;[4] and, 2) removal of the case on the basis of federal preemption was proper. (A. 25). Summary judgment was then granted on the ground that the Nuclear Regulatory Commission is the agency entrusted with the authority to regulate the disposal of radioactive materials at the Kerr-McGee facility.

On May 4, 1982, the Seventh Circuit, without considering the preemption issues, reversed the district court's decision on removal and directed a remand to the state court. The Court of Appeals held that even where the state law is wholly preempted by federal law, the claim does not "arise under" federal law because "federal preemption is merely a defense to state law claims." (A. 11).

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[4] Although section 274 of the Atomic Energy Act (42 U. S. C. § 2021) establishes procedures whereby states may assume certain specified responsibilities otherwise within exclusive NRC domain, such an assumption can take place only if a State enters into a "Section 274 Agreement" with the NRC. Since Illinois has never entered into such an agreement, the NRC has surrendered none of its authority to regulate radiological materials in Illinois.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts with the Law of Other Circuits

The courts of appeals are in conflict as to whether or not federal preemption provides a basis for removal of a state court action to federal court. The Seventh Circuit expressly conceded this split in authority:

> Kerr-McGee has cited a number of cases in which removal of suits to federal court was permitted because state law had been preempted. To the extent that these cases are in conflict with our decision here, we decline to follow them.

(A. 10).

The decision of the Seventh Circuit is in *direct* conflict with the law of at least two other circuits. Cases from the Second and Sixth circuits hold that federal preemption, rather than a mere "defense" to state law claims, represents a supplanting of state law with federal substantive law in the field. Thus, a plaintiff's right to relief in those instances is determined exclusively under federal law and the action is removable.

The Second Circuit has held that removal of a claim for losses against an air carrier is appropriate since the regulation of common carriers has been preempted by the federal government. In *North American Phillips Corp.* v. *Emery Air Freight Corp.*, 579 F. 2d 229 (2d Cir. 1978) the court recognized:

> Congress has created a broad, comprehensive scheme covering the interstate shipment of freight, aimed at preventing preferential treatment among shippers and establishing national equality of rates and services. This has occupied the field to the exclusion of state law. . . . The allegations of appellant's complaint show that its claim is based upon the loss of goods during interstate transportation by appellee as a common carrier for hire.

Id. at 233-234. *See also Beech-Nut, Inc.* v. *Warner-Lambert Co.*, 480 F. 2d 801 (2d Cir. 1973).

In *Avco Corp.* v. *Aero Lodge No. 735*, 376 F. 2d 337 (6th Cir. 1967), *aff'd*, 390 U. S. 557 (1968) the Sixth Circuit affirmed removal of a complaint asserting a state law claim because the subject matter of that claim was preempted by federal labor law. Although the plaintiff asserted that the alleged breach of contract was a state law claim, the Sixth Circuit held that § 301 of the Labor Management Relations Act preempts state law and plaintiff had no independent state court rights. Even though § 301 was not referred to in the complaint, removal was held to be proper because federal preemption creates "arising under" jurisdiction. *See also McKinney* v. *International Association of Machinists*, 624 F. 2d 745 (6th Cir. 1980).

In contrast to the rulings of the Second and Sixth Circuits, decisions from the Third and Eighth Circuits hold that federal preemption is merely a defense to a state law claim and not a ground for federal removal jurisdiction. *Trent Realty Associates* v. *First Federal Savings & Loan Association of Philadelphia*, 657 F. 2d 29 (3d Cir. 1981); *Lawrence County* v. *South Dakota*, 668 F. 2d 27 (8th Cir. 1982); and *First National Bank of Aberdeen* v. *Aberdeen National Bank*, 627 F. 2d 843 (8th Cir. 1980). These decisions equate federal occupation of the field with defenses based on federal law and therefore arrive at the mistaken conclusion that removal is improper because the claims do not arise under federal law but are merely affected by it.

The decisions of the Courts of Appeals in these cases provide no analytical basis on which to reconcile this conflict. This split among the circuit courts, therefore, necessitates a grant of certiorari to review this important and often litigated question of federal jurisdiction.

The need for review by this Court is further exemplified by the confused state of the law within the Ninth and Tenth Circuits. Although several cases from the Ninth Circuit have

held that federal preemption provides a basis for removal, other cases from that circuit have taken the opposite view. *Compare: Lafferty* v. *Solar Turbines International,* 666 F. 2d 408 (9th Cir. 1982); *Fristoe* v. *Reynolds Metals Co.,* 615 F. 2d 1209 (9th Cir. 1980); *Sheeran* v. *General Electric Co.,* 593 F. 2d 93 (9th Cir.), *cert. denied,* 444 U. S. 868 (1979); and *Meyers* v. *Beverly Hills Federal Savings & Loan Association,* 499 F. 2d 1145 (9th Cir. 1974), holding that federal preemption provides a basis for removal jurisdiction, *with Nalore* v. *San Diego Federal Savings & Loan Association,* 663 F. 2d 841 (9th Cir. 1981), *cert. denied,* 102 S. Ct. 1719 (1982); *Guinasso* v. *Pacific First Federal Savings & Loan Association,* 656 F.2d 1364 (9th Cir. 1981), *cert. denied,* 102 S. Ct. 1716 (1982); and *Washington* v. *American League of Professional Baseball Clubs,* 460 F. 2d 654 (9th Cir. 1972) holding that federal preemption is a mere defense to state law claims and, therefore, does not provide a basis for removal jurisdiction. This situation within the Ninth Circuit has left the district courts without guidance: "There is a conflict in the cases whether federal preemption alone is a sufficient basis for removal. . . . It is unclear which rationale this circuit follows." *Salveson* v. *Western States Bankcard Association,* 525 F. Supp. 566, 572 (N. D. Cal. 1981).[5]

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[5] District courts within other circuits also have noted the confusion and lack of uniformity surrounding this area of the law. *See e.g. Brown & Sharpe Mfg. Co.* v. *Lodges 1088 & 1142, Int'l Ass'n of Machinists,* 535 F. Supp. 167, 169 n. 1, 170 (D. R. I. 1982) ("The law on the removability of preempted state law claims is currently in disarray. . . . Without appellate instruction, it is not surprising that the decisions of the district courts are in disarray."); *Billy Jack for Her, Inc.* v. *New York Coat, Suit, Dress, Rainwear & Allied Workers' Union,* 511 F. Supp. 1180, 1185 n. 6 (S.D.N.Y. 1981) ("the courts are in substantial conflict on this issue [of preemption-based removal]").

The decisions in the Tenth Circuit Court of Appeals are also incongruous. In *North Davis Bank* v. *First National Bank of Layton*, 457 F. 2d 820 (10th Cir. 1972), the court held that a state law claim seeking to prohibit a national bank from establishing a branch office was properly removed because the subject of the litigation had been preempted by federal law. The preemptive law, of necessity, formed "the essential element of the plaintiff's claim." *Id.* at 823. Contrary to *North Davis Bank*, in *Madsen* v. *Prudential Federal Savings & Loan Association*, 635 F. 2d 797 (10th Cir. 1980), *cert. denied*, 451 U. S. 1018 (1981), the Tenth Circuit remanded a state court contract action after finding that the claim was not founded upon federal law and did not require the application of federal law. According to the court, even if federal preemption were established, "it would not confer jurisdiction when it is raised by the *defendant* to defeat a common-law contract claim brought in state court." *Id.* at 801. The Tenth Circuit, however, carefully distinguished and left intact its earlier holding in *North Davis Bank* on the ground that the state court claim there necessarily had its "source" in a federal statute.

The direct conflict among and within the circuit courts as to whether federal preemption supplants state law and creates "arising under" jurisdiction or whether federal preemption is merely a defense to a state law claim requires prompt resolution through the vehicle of a case such as this where the issue is squarely presented without encumbrance of unrelated matters. The issue is frequently litigated because defendants such as Kerr-McGee who operate in an area preempted by federal law and regulation believe that their rights and obligations under that law should be adjudicated in a federal forum. Until this Court clarifies this jurisdictional issue, lower courts and counsel will continue to expend an inordinate amount of time and resources litigating the question. In addition to the conflicting appellate court cases, in the last six years alone the issue of

preemption removal has been considered by more than thirty district court decisions in more than twenty districts.[6]

A writ of certiorari should be granted to resolve the existing conflict among and within the courts of appeals and to reduce the substantial effort currently being expended on this jurisdictional issue in the lower courts.

II.

The Decision of the Court of Appeals Conflicts With Decisions of This Court

A writ of certiorari should be issued to review the decision of the Court of Appeals below because that decision conflicts with prior decisions of this Court. In *Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557 (1968), this Court held that a suit purporting

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[6] The following cases have found that federal preemption provides a basis for federal question jurisdiction: *Alameda Room, Inc.* v. *Pitta*, No. 81 Civ. 7710 (S.D.N.Y., May 13, 1982); *Palm Beach Co.* v. *Journeymen's Local 157*, 519 F.Supp. 705 (S.D.N.Y. 1981); *Billy Jack For Her, Inc.* v. *New York Coat, Suit, Dress, Rainwear & Allied Workers' Union*, 511 F.Supp. 1180 (S.D.N.Y. 1981); *Louisiana ex rel. Guste* v. *Fedders Corp.*, 524 F.Supp. 552 (M.D.La. 1981); *Johnny's Pizza House, Inc.* v. *G & H Properties, Inc.*, 524 F.Supp. 495 (W.D.La. 1981); *Salveson* v. *Western States Bankcard Ass'n*, 525 F.Supp. 566 (N.D.Cal. 1981); *Glass Bottle Blowers Ass'n* v. *Certain-teed Corp.*, 93 CCH Lab. Cas. ¶ 13,335 (M.D.Ga. 1981); *United Transp. Union* v. *Consolidated Rail Corp.*, 90 CCH Lab. Cas ¶ 12,441 (N.D.Ind. 1980); *Capital Parcel Delivery Co.* v. *Chauffeurs Local 150*, 105 L.R.R.M. 3351 (E.D.Cal. 1980); *Illinois ex rel. Dixon* v. *TRE Corp.*, No. 79 C 5231 (N.D.Ill., December 21, 1979); *Bailey* v. *First Fed. Sav. & Loan Ass'n of Ottawa*, 467 F.Supp. 1139 (C.D.Ill. 1979); *First Fed. Sav. & Loan Ass'n of Jackson County* v. *First Fed. Sav. & Loan Ass'n of Huntsville*, 446 F.Supp. 210 (N.D.Ala. 1978); *Guthrie* v. *Dow Chemical Co.*, 445 F.Supp. 311 (S.D.Tex. 1978); *Teamsters Local 116* v. *Fargo-Moorhead Auto. Dealers Ass'n*, 459 F.Supp. 558 (D. N.D. 1978); *New York* v. *Local 144, Hotel, Nursing Home & Allied Health Serv. Union*, 410 F.Supp. 225 (S.D.N.Y.

(Footnote continued on following page)

to allege solely state law claims for breach of contract was properly removable to the district court, pursuant to 28 U.S.C. § 1441(b), because the subject matter of the complaint was preempted by federal law. The alleged breach arose out of a collective bargaining agreement and thus, Section 301 of the Labor Management Relations Act preempted state law. This Court held that under such circumstances, the action was removable, despite the plaintiff's attempt to characterize its

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(Footnote continued from preceding page)

1976); and *Ashley* v. *Southwestern Bell Tel. Co.*, 410 F.Supp. 1389 (W.D.Tex. 1976). The following cases have found that federal preemption does not provide a basis for federal question jurisdiction: *Schultz* v. *Coral Gables Fed. Sav. & Loan Ass'n*, 505 F.Supp. 1003 (S.D.Fla. 1981); *Drivers, Local 639* v. *Seagram Sales Corp.*, 531 F.Supp. 364 (D.D.C. 1981); *349 West 57th St. Constr. Corp.* v. *Cody*, 90 CCH Lab. Cas. ¶ 12,599 (S.D.N.Y. 1980); *Long Island R.R.* v. *United Transp. Union*, 484 F.Supp. 1290 (S.D.N.Y. 1980); *Smart* v. *First Fed. Sav. & Loan Ass'n of Detroit*, 500 F.Supp. 1147 (E.D.Mich. 1980); *Sepia Trucking Co.* v. *Int'l Bhd. of Teamsters, Local 705*, No. 80 C 403 (N.D.Ill., July 31, 1980); *Turner* v. *Bell Fed. Sav. & Loan Ass'n*, 490 F.Supp. 104 (N.D. Ill. 1980); *Eure* v. *NVF Co.*, 481 F.Supp. 639 (E.D.N.C. 1979); *Glendale Fed. Sav. & Loan Ass'n* v. *Fox*, 481 F.Supp. 616 (C.D.Cal. 1979); *California* v. *Glendale Fed. Sav. & Loan Ass'n*, 475 F.Supp. 728 (C.D.Cal. 1979); *Nevada* v. *King*, 463 F.Supp. 749 (D.Nev. 1979); *Jurisch* v. *Arlington Heights Fed. Sav. & Loan Ass'n*, No. 77 C 4024 (N.D.Ill., May 26, 1978); *Borzello* v. *Charles D. Sooy & C. Darrell Sooy*, 427 F.Supp. 332 (N.D.Cal. 1977); *Oklahoma ex rel. Grimes* v. *United Health & Retirement Ass'n*, 436 F.Supp. 550 (W.D. Okla. 1977); *Johnson* v. *First Fed. Sav. & Loan Ass'n of Detroit*, 418 F.Supp. 1106 (E.D.Mich. 1976); and *Marquette Nat'l Bank of Minneapolis* v. *First Nat'l Bank of Omaha*, 422 F.Supp. 1346 (D.Minn. 1976). The following cases, while discussing the issue of preemption-based removal at length and noting the conflict in existing case law, do not reach a resolution of the issue: *Brown & Sharpe Mfg. Co.* v. *Lodges 1088 & 1142, Int'l Ass'n of Machinists*, 535 F.Supp. 167 (D.R.I. 1982); *Connecticut* v. *Levi Strauss & Co.*, 471 F.Supp. 363 (D.Conn. 1979). There are undoubtedly many more unreported decisions concerning preemption as a basis for removal.

claim as based wholly on state law.[7] This Court, noting that "[r]emoval is but one aspect of the primacy of the federal judiciary in deciding questions of federal law,"[8] held that where federal preemption was involved, federal law controlled the decision and the case became removable under § 1441(b).

More recently, in *Federated Department Stores* v. *Moitie*, 452 U. S. 394 (1981), this Court again affirmed removal of an action purportedly based on state-created rights because those rights had a sufficient "federal character to support removal." 452 U. S. at 397 n.2. In so doing this Court affirmed the district court's finding that plaintiffs could not "avoid removal jurisdiction by casting their essentially federal law claims as state-law claims." *Id.*

Justice Brennan dissented in *Moitie*, arguing that plaintiff's claims were purely state-created and not federal in character. However, Justice Brennan specifically noted that where state-created claims infringe on an area of law preempted by federal regulation, removal is appropriate.

> The general rule that a plaintiff basing his claim solely on state law thereby avoids removal applies only where state substantive law has not been preempted by federal law.
>
> * * *
>
> "[W]here Congress has explicitly said that the exclusive source of a plaintiff's right to relief is to be federal law, it would be unacceptable to permit that very plaintiff, by the artful manipulation of the terms of a complaint, to defeat a clearly enunciated congressional objective."[9]

452 U. S. at 407-408.

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[7] *See also* the decision of the Sixth Circuit where the court notes plaintiff's disavowal of any reliance on federal law. *Avco Corp.* v. *Aero Lodge No. 735*, 376 F. 2d 337, 339 (6th Cir. 1967).

[8] The Court cited *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U. S. 411, 415-416 (1964).

[9] Quoting from *Hearst Corp.* v. *Shopping Center Network, Inc.*, 307 F. Supp. 551, 556 (S. D. N. Y. 1969).

The court below declined to follow the Supreme Court authority directly on point.[10] Consequently, granting a writ of certiorari here is necessary to protect the vitality of the Court's decisions in this important area of federal jurisdiction.[11]

III.

The Court Should Grant the Writ to Prevent Unnecessary Impairment of the Policies Underlying Federal Preemption and Federal Removal Jurisdiction

A.

The Decision of the Court of Appeals Impairs the Policies Underlying Federal Preemption and Federal Removal Jurisdiction

By denying defendant's right to remove an action which must rest on federal law because of federal preemption, the decision of the court below impairs two important federal policies underlying the preemption doctrine and the removal statute: the primacy of federal law in preempted areas, and the availability of a federal forum for litigation of claims which are grounded inherently in federal law. To preserve those policies the writ should be granted.

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[10] The court argued that *Avco* had been criticized by this Court in *Boys Mkts., Inc.* v. *Retail Clerks Local 770,* 398 U. S. 235, 244-45 (1970) and lacked vitality. (A. 10). In *Boys Markets,* however, this Court, in its opinion by Justice Brennan, merely recognized that in light of *Avco,* the Court's decision in *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195 (1962), should be reexamined. The Court's action in overruling *Sinclair,* rather than limiting *Avco,* demonstrated *Avco's* continuing force, a point ignored by the Seventh Circuit.

[11] In holding that federal preemption may not be the basis for a removal petition under 28 U. S. C. § 1441, the Seventh Circuit argued that this Court had "never faced the issue directly." (A. 9). While we believe that view stems from a misreading of *Avco, supra,* even if the Court of Appeals were correct, the absence of a decision by this Court on this important question of federal jurisdiction justifies granting a writ of certiorari, pursuant to Rule 17(c) of the Court's rules.

Despite its acknowledgment that the Atomic Energy Act preempts state regulation of radiation hazards (A. 16-18), the decision below effectively denies defendants access to federal courts to determine the scope of the preemption doctrine, as applied to a plaintiff's claim involving materials subject to NRC jurisdiction. Thus, under the decision below, whenever a plaintiff seeks recovery in an area preempted by federal law (such as the NRC's regulation of radioactive materials), it need only cast its complaint in state law terms in order to deny the defendant a federal forum for determination of the scope and effect of federal occupation of the field. This will remain the case despite a Congressional determination that excludes state regulation from the area in question.

Thus, complex and highly significant questions of federal preemption,[12] will frequently be left to determination by state courts.[13] The resulting lack of uniformity in federally preempted matters, and potential erosion of federal supremacy in regulation of radiation and other preemptive areas, should not be permitted to stand. Nor should a defendant, seeking to assert rights granted under a preemptive federal regulatory scheme, be denied access to the federal courts for determination of those rights.

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[12] *E.g.*, the scope of state power to regulate nuclear facilities, such as power plants, is presently before this Court in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm., cert. granted*, 50 U.S.L.W. 3994 (June 21, 1982).

[13] Since a state is not a citizen for diversity purposes, *Illinois* v. *City of Milwaukee*, 406 U. S. 91 (1972), where a state is plaintiff, removal cannot be based on diversity of citizenship. Thus, if a state, as plaintiff, seeks to regulate areas preempted by federal law, unless defendant can remove under 28 U.S.C. § 1441, the only federal review will be in this Court, on review of decisions of state courts of last resort.

B.

The Decision of the Court of Appeals is Incorrect

Aside from its impairment of important federal policies, the decision of the Court of Appeals simply reaches the wrong analytical result. Even though a plaintiff purports to base its claim solely on state law, where the subject matter of the action is preempted by federal law, plaintiff's claim is "one arising under the 'laws of the United States' within the meaning of the removal statute. 28 U. S. C. § 1441(b)." *Avco Corp.* v. *Aero Lodge 735, supra,* 390 U. S. at 560.

The decision below allows the very conduct rejected in *Avco* and *Moitie*—attempting to defeat removal jurisdiction through artfully crafting a complaint in state-law terms, and using that action to regulate a federally preempted area. Although the State attempts to avoid reference to the Atomic Energy Act or the Nuclear Regulatory Commission in its Complaint (A. 32), a threshold scrutiny of its claim reveals that the State seeks to regulate the disposal of the radioactive by-products of the rare-earth facility now owned by Kerr-McGee. (A. 33-35). Those thorium-containing wastes are presently regulated by the Nuclear Regulatory Commission, pursuant to the Atomic Energy Act, as amended (A. 61), and the conflict between the relief sought by the State in its complaint and the NRC's regulation of radiation hazards is direct and immediate. Plaintiff's complaint seeks to require Kerr-McGee to remove all the radioactive tailings from the site. (A. 35). The NRC, on the other hand, has concluded in its draft environmental statement relating to these wastes that the preferable course of action is to encapsulate the materials on-site. (NUREG-0904).

Consequently, as in *Avco*, the plaintiff's attempt to characterize its claims as state-created is irrelevant. The wastes it allegedly seeks to regulate are inseparable from those subject to the exclusive jurisdiction of the Nuclear Regulatory Commission, and regulation of such waste is subject to federal preemption. *Northern States Power Co. v. Minnesota*, 447 F. 2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U. S. 1035 (1972); *Train v. Colorado Public Interest Research Group, Inc.*, 426 U. S. 1 (1976). Thus, in this case, as in *Avco*, the asserted state law is supplanted by preemptive federal law. Plaintiff's claim, therefore, takes on a "sufficient federal character" to meet the "arising under" requirement of 28 U. S. C. § 1441(b), and was properly removed to the district court. *See* 390 U. S. at 560.[14]

The proper course on preemption-based removal is to determine if federal preemption applies.[15] If not, remand is appropriate. If preemption applies, the court should determine whether federal law precludes the claim asserted in the com-

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[14] One commentator has stated the rule in these terms:

> "If the only remedy available to plaintiff is federal, because of preemption or otherwise, and the state court necessarily must look to federal law in passing on the claim, the case is removable regardless of what is in the pleading."

Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3722, at pp. 567-69 (1976 Ed.).

[15] Contrary to the suggestion of the Court of Appeals (A. 9), Kerr-McGee has never suggested that a defendant may sustain removal "merely by uttering the word preemption." The existence of preemption is a legal and factual question which, as Justice Brennan suggested in *Moitie, supra*, (452 U. S. at 408) requires the district court to scrutinize the complaint to determine whether the putative state claim "is actually grounded on a claim in which federal law is the exclusive authority." Under this procedure, followed by Judge McGarr below, the determination of federal preemption is rendered in a federal forum, and determination of the scope of federal court jurisdiction is not left to the state courts.

plaint. If so, the action may be dismissed.[16] If not, plaintiff may proceed to assert its federal rights. The trial court properly followed this procedure, and its reversal by the Seventh Circuit was error.

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[16] The Court of Appeals was troubled by the effect of "derivative jurisdiction" on removal based upon federal preemption. (A. 7, n.6). Derivative jurisdiction refers to the concept that a federal court on removal acquires the jurisdiction which the state court possessed. *See Lambert Run Coal Co. v. Baltimore & Ohio Railroad*, 258 U.S. 377 (1922); *Freeman v. Bee Machine Co.*, 319 U.S. 448, 451 (1943). However, every court has jurisdiction to determine its jurisdiction. *See e.g., United States v. Shipp*, 203 U.S. 563, 573 (1906); *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947). Thus, as the court in *Billy Jack for Her, Inc. v. New York Coat, Suit, Dress, Rainwear & Allied Workers' Union*, 511 F.Supp. 1180, 1187 held, a federal court upon removal acquires (derivatively) jurisdiction to determine jurisdiction, even where federal preemption may preclude all relief for plaintiff:

> The Court finds nothing 'illogical' in holding that preemption *always* creates 'arising under' jurisdiction, even in a case where the preemptive federal law provides the plaintiff with no right to relief. The reports are certainly well stocked with cases where the plaintiff maintained an action under federal law only to discover to its chagrin that federal law afforded no remedy.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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82-386

No.

Office-Supreme Court, U.S.
FILED
SEP 2 1982
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KERR-McGEE CHEMICAL CORPORATION,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 81-1110

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

KERR-McGEE CHEMICAL CORPORATION,

Defendant-Appellee.

and

No. 81-1152

CITY OF WEST CHICAGO, a Municipal Corporation,

Plaintiff-Appellant,

v.

KERR-McGEE CHEMICAL CORPORATION, a Delaware Corporation,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 80 C 2776 and 80 C 3357—**Frank J. McGarr**, *Judge.*

ARGUED OCTOBER 2, 1981—DECIDED MAY 4, 1982

Before SPRECHER and WOOD, *Circuit Judges,* and BROWN, *Senior District Judge.**

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* Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

SPRECHER, *Circuit Judge.* These cases concern approximately forty-three acres of land which defendant Kerr-McGee Chemical Corporation owns and operates within the limits of the City of West Chicago, Illinois. The site consists of eight acres containing twenty-one factory and other buildings, twenty-seven acres used for waste disposal, and eight acres separating the factory and disposal areas. Since at least World War II, the facility has been used by Kerr-McGee and its predecessor companies to produce various compounds derived from radioactive natural ores. These activities generated large quantities of solid and liquid wastes.

Since 1956 the facility has been licensed by the Atomic Energy Commission (AEC) and its successor, the Nuclear Regulatory Commission (NRC).[1] Kerr-McGee ceased all operations on the site in 1973 but continued, under license from the NRC, to possess and store thorium ores there.[2] Since 1975 Kerr-McGee has been working, at the NRC's direction, to formulate a plan for decommissioning and stabilizing the site. Both the State of Illinois and the City of West Chicago have commented on the proposed plan, and the NRC is currently preparing an environmental impact statement on the project.

On April 28, 1980, the State of Illinois filed a complaint against Kerr-McGee in the Circuit Court of Illinois for DuPage County. The complaint alleged that Kerr-McGee's operation

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[1] The Atomic Energy Commission (AEC) was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891. In its place Congress created the Nuclear Regulatory Commission (NRC), which assumed the regulatory functions of the AEC, and the Energy Research and Development Administration, which took responsibility for the promotion and development of atomic energy. In this opinion we use the terms Atomic Energy Commission (AEC) for periods before 1974 and Nuclear Regulatory Commission (NRC) for periods after 1974. The term "the Commission" is used to refer to either body.

[2] The Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, defines thorium as a nuclear "source material", 42 U.S.C. § 2014(z), which is subject to regulation by the Commission.

and maintenance of the site violate the Illinois Environmental Protection Act, ILL. REV. STAT. ch. 111½, § 1001 *et seq.*, and other state statutes pertaining to the disposal of hazardous wastes. On June 13, 1980, the City of West Chicago filed suit in the same court, charging Kerr-McGee with maintenance of a public nuisance, unlawful condemnation of public property, and violation of state and city regulations.

Kerr-McGee petitioned to have both cases removed to federal court. With regard to the City of West Chicago's case, the grounds for removal were that the complaint stated a controversy arising under the laws of the United States and that there was diversity of citizenship between the parties. Removal of the state's suit was based solely on the argument that the complaint raised a federal question.

The city did not contest removal of its suit. The state, however, moved to remand to state court, arguing that it had pleaded no federal cause of action. Denying the state's motion for remand, the district court found that the federal regulatory scheme under the Atomic Energy Act has preempted state regulation of radioactive waste disposal. Since the state's complaint necessarily involved the interpretation of federal law, the district court held that the case was properly removed. *Illinois v. Kerr-McGee Chemical Corp.*, No. 80 C 2776 (N.D.Ill. Aug. 15, 1980).

Kerr-McGee subsequently moved to dismiss both complaints. The district court granted the motions, finding that federal law conferred exclusive jurisdiction upon the NRC to regulate radiation hazards and, therefore, preempted state and local legislative and administrative regulatory schemes. *Illinois v. Kerr-McGee Chemical Corp.*, Nos. 80 C 2776 and 80 C 3357 (N.D.Ill. Jan. 8, 1981). These appeals followed. Because we decide the state's and the city's appeals on different grounds, we will consider each case separately.

I

Illinois v. Kerr-McGee Chemical Corp., No. 81-1110

The State of Illinois argues that the case was improperly removed to federal court and that federal law has not pre-empted the state regulatory scheme at issue. We find that the state's case against Kerr-McGee was improperly removed to federal court. We have no occasion, therefore, to consider the question of preemption with regard to the state's case.

A

Under 28 U.S.C. § 1441(a) and (b), any or all defendants may remove a civil action brought in state court to federal court if the action is founded on a claim "arising under" federal law or if none of the defendants are citizens of the state where the action was brought.[3] Removal jurisdiction is thus keyed to the

[3] 28 U.S.C. § 1441 provides:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

federal courts' original jurisdiction over federal question and diversity suits.[4] The general rule is that a case can be removed from state court only if the federal court would have had original jurisdiction over the action had it been brought there initially. *Arkansas v. Kansas & Texas Coal Co.*, 183 U.S. 185, 189 (1901); *First National Bank v. Aberdeen National Bank*, 627 F.2d 843, 848 (8th Cir. 1980). Because there can be no diversity of citizenship between the State of Illinois and Kerr-McGee,[5] we will examine only the removability of claims "arising under" federal law.

The current removal statute, 28 U.S.C. § 1441, is heir to a large body of case law that began with interpretations of the 1887 removal statute. Act of Mar. 3, 1887, ch. 373, 24 Stat. 552. That case law embodies a number of principles used by federal courts in deciding whether a case involves a federal question warranting removal. First among these principles is that the existence of a federal question must appear on the face of the plaintiff's complaint. *See Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125, 127 (1974); *Gully v. First National Bank*, 299 U.S. 109, 112-13 (1936); *Tennessee v. Union and Planters' Bank*, 152 U.S. 454, 460 (1894); *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 249 (7th Cir. 1981). Thus a defendant's assertion of an issue of federal law in the pleadings or in the petition for removal does not create a federal question. *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125, 127-28 (1974); *Arkansas v. Kansas & Texas Coal Co.*, 183 U.S. 185, 188 (1901); *Nuclear Engineering Co. v. Scott*, 660 F.2d 241,

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[4] 28 U.S.C. § 1331 defines the original jurisdiction of the federal courts over civil actions involving questions of federal law. 28 U.S.C. § 1332 performs the same function for suits in which there is diversity of citizenship.

[5] It is well-established that a state is not considered a citizen of any state for the purposes of diversity jurisdiction. Thus there can be no diversity jurisdiction when a state is a real party in interest to a lawsuit. *See State Highway Comm'n v. Utah Constr. Co.*, 278 U.S. 194, 200 (1929); 1A MOORE'S FEDERAL PRACTICE ¶ 0.161[1], at 525 (2d ed. 1981).

249 (7th Cir. 1981). A plaintiff who has both federal and state causes of action may choose to ignore the federal claims and pursue only the state claims in state court. *See Pan American Petroleum Corp. v. Superior Court,* 366 U.S. 656, 663 (1961); *Great Northern Railway Co. v. Alexander,* 246 U.S. 276, 282 (1918); *Jones v. General Tire & Rubber Co.,* 541 F.2d 660, 664 (7th Cir. 1976). The defendant is entitled to have the case removed to federal court, however, if the plaintiff is attempting to avoid having an essentially federal claim adjudicated in a federal forum merely by artfully drafting the complaint in terms of state law. *See Nuclear Engineering Co. v. Scott,* 660 F.2d 241, 249 (7th Cir. 1981); *Jones v. General Tire & Rubber Co.,* 541 F.2d 660, 664 (7th Cir. 1976). Nevertheless, the federal question must be an essential element of the plaintiff's complaint to provide grounds for removal. *Phillips Petroleum Co. v. Texaco Inc.,* 415 U.S. 125, 127 (1974); *Gully v. First National Bank,* 299 U.S. 109, 112 (1936); *Nuclear Engineering Co. v. Scott,* 660 F.2d 241, 249 (7th Cir. 1981); *Jones v. General Tire & Rubber Co.,* 541 F.2d 660, 664 (7th Cir. 1976).

A problematic aspect of removal jurisdiction is that it is derivative, that is, a case can be removed to federal court only if it was properly before the state court. If the state court lacks jurisdiction over either the subject matter or one of the parties, the federal court cannot acquire jurisdiction on removal. This is true even if the case properly could have been brought in federal court in the first instance. *See Lambert Run Coal Co. v. Baltimore & Ohio Railroad Co.,* 258 U.S. 377, 382 (1922); *Washington v. American League of Professional Baseball Clubs,* 460 F.2d 654, 658 (9th Cir. 1972); *Koppers Co. v. Continental Casualty Co.,* 337 F.2d 499, 501 (8th Cir. 1964). As others have noted, this is exactly the type of "legal *tour de force*" that lay persons abhor. *See, e.g., Washington v. American League of Professional Baseball Clubs,* 460 F.2d 654, 658 (9th Cir. 1972). However, the rule is so well-entrenched now that it would take

legislative action to dislodge it. 14 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722, at 576 (1976).[6]

One final principle to be considered is that the removal statute should be construed narrowly and against removal. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941); *Arkansas v. Kansas & Texas Coal Co.*, 183 U.S. 185, 188 (1901); *La Chemise Lacoste v. Alligator Co.*, 506 F.2d 339, 344 (3d Cir. 1974), *cert. denied*, 421 U.S. 937 (1975). This has been the policy of Congress since at least 1887,[7] and it is evident in successive versions of the removal statute. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941). The

[6] The derivative jurisdiction doctrine is a problem for Kerr-McGee because the company has argued both that the case was properly removed to federal court and that federal law governing nuclear hazards has completely preempted the state regulatory scheme at issue here. If Kerr-McGee is correct that the case was properly removed to federal court, it must be that the state court had jurisdiction and state law has not been preempted. If, on the other hand, state law has been preempted, then the case was never properly before the state court and the federal court cannot have jurisdiction on removal. Because we find it unnecessary to reach the issue of preemption with respect to this particular case, we are able to avoid this tangled web of legal causistry.

[7] In the removal statute of 1887, Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, Congress clearly reduced the federal courts' removal jurisdiction after twenty years of expansion. In 1867, in response to the bitter sectional animosity engendered by the Civil War, the removal statute had been amended to allow for removal of suits to federal court if it appeared that either party would be unable to obtain justice in the state court because of "prejudice or local influence." Act of Mar. 2, 1867, ch. 196, 14 Stat. 558 (amending Act of July 27, 1866, ch. 288, 14 Stat. 306). The 1875 removal statute, Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, had further expanded removal jurisdiction by permitting *either* party to remove a case to federal court if there was a federal question or diversity of citizenship. In contrast, the 1887 removal statute evinces a conscious purpose on the part of Congress to limit federal removal jurisdiction by allowing only *defendants* to have cases removed to federal court. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106-07 and n.2 (1941) (quoting H.R. REP. No. 1078, 49th Cong., 1st Sess. 1 (1887)).

Supreme Court has been loathe to expand the federal courts' removal jurisdiction and has continually refused to recognize exceptions to the general principles discussed above. *See, e.g., Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127-28 (1974). Indeed, almost all Supreme Court decisions expounding the law of removal have been in the context of holding that removal was unwarranted.[8] With these principles in mind, we turn to consideration of Illinois' complaint to determine if a federal claim has been asserted.

Illinois' complaint alleges that Kerr-McGee's operation of the West Chicago facility violates state law by improperly maintaining and disposing of solid and liquid hazardous wastes, by creating a water pollution hazard, by failing to register the site in accordance with state regulations, and by creating a public nuisance. These claims are grounded in the Illinois Environmental Protection Act, ILL.REV.STAT., ch. 111½, § 1001 *et seq.*, its predecessor statute, the Illinois Refuse Disposal Act, ILL.REV.STAT., ch. 111½, § 471 *et seq.* (repealed by P.A. 76-2429, § 50, effective July 1, 1970),[9] the Illinois Public Nuisance Act, ILL.REV.STAT., ch. 100½, § 26, regulations

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[8] *See e.g., Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125 (1974); *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936); *General Inv. Co. v. Lake Shore & Michigan Southern Ry. Co.*, 260 U.S. 261 (1922); *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377 (1922); *Great Northern Ry. Co. v. Alexander*, 246 U.S. 276 (1918); *Arkansas v. Kansas & Texas Coal Co.*, 183 U.S. 185 (1901); *Tennessee v. Union and Planters' Bank*, 152 U.S. 454 (1894). The only case we have found in which the Supreme Court appears to expand the removal jurisdiction of the federal courts is *Avco Corp. v. Aero Lodge 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557 (1968). The reasons we feel *Avco* does not govern this case are discussed *infra*, at n.10.

[9] The state has pleaded a cause of action under a statute that is no longer in force in an apparent attempt to reach alleged violations that may have occurred before the Illinois Environmental Protection Act was enacted. *See* Count V of the State of Illinois' Complaint.

of the Illinois Pollution Control Board and the Illinois Department of Public Health, and common law nuisance. Nowhere in its complaint does the state rely on or even allude to federal statutes or case law. Nor can we find any basis for concluding that the state has artfully drafted its complaint in order to defeat removal. *See Jones v. General Tire & Rubber Co.*, 541 F.2d 660, 664 (7th Cir. 1976). We find, therefore, that the state's complaint pleads only state causes of action and does not raise a federal question justifying removal of the case to federal court.

B

Our decision that Illinois has not stated a federal claim warranting removal of this case to federal court does not end our inquiry, however. Kerr-McGee argues that, by raising the issue of preemption, it has created a federal question that must be decided in federal court regardless of the claims appearing on the face of the state's complaint. Kerr-McGee contends that preemption is different from defenses on the merits in that the question of whether or not state law is preempted depends entirely on the interpretation of federal statutes and cases. If preemption appears to be a determinative element in the case, Kerr-McGee argues, the action can be characterized as one "arising under" federal law, and removal is therefore proper under 28 U.S.C. § 1441.

We cannot accept Kerr-McGee's argument. The company is correct in saying that if state law is preempted by federal law, a plaintiff may seek a remedy in federal court. We do not agree, however, that a defendant can have a state law claim removed to federal court merely by uttering the word preemption. No such result has been authorized by statute, nor has it been sanctioned by the Supreme Court. Although the Court has never faced the issue directly, certain opinions have suggested that the defense of federal preemption does not create a

federal question for the purpose of removal. *See e.g., Gully v. First National Bank*, 299 U.S. 109, 116 (1936). Indeed, in *Bailey v. Logan Square Typographers*, 441 F.2d 47 (7th Cir. 1971), a suit for the wrongful appropriation of intellectual property, this circuit found that the issue of preemption was a defense to the claim, rather than a part of the claim itself. Such a federal defense to a state claim was held not to be a sufficient basis for the exercise of removal jurisdiction. In the course of his opinion, then Judge Stevens said, "It is well settled that a federal prohibition against the prosecution of a state claim is not a basis for removal to the federal court." *Id.* at 51-52 (quoting *Gully v. First National Bank*, 299 U.S. 109, 116 (1936)).

Kerr-McGee has cited a number of cases in which removal of suits to federal court was permitted because state law had been preempted.[10] To the extent that these cases are in conflict

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[10] *See e.g., Beech-Nut, Inc. v. Warner-Lambert Co.*, 480 F.2d 801, 803 (2d Cir. 1973); *Bailey v. First Fed. Sav. & Loan Ass'n*, 467 F.Supp. 1139, 1141 (N.D.Ill. 1979); *Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n*, 405 F.Supp. 819, 823 (N.D.Ill. 1975); *Sweeney v. Morgan Drive Away, Inc.*, 394 F.Supp. 1216, 1218 (D.Colo. 1975); *Sylgab Steel & Wire Corp. v. Strickland Transp. Co.*, 270 F.Supp. 264, 271 (E.D.N.Y. 1967).

Kerr-McGee places great reliance on the Supreme Court's opinion in *Avco Corp. v. Aero Lodge 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557 (1968). *Avco* held that because federal substantive law was controlling on the issue of whether an employer could enforce a no-strike clause in a collective bargaining agreement, the suit was properly removed to federal court. We do not read *Avco* to say, however, that a defendant can always have a case removed to federal court merely by arguing that state law has been preempted. First, the Supreme Court has not utilized *Avco* to expand the federal courts' removal jurisdiction. *See, e.g., Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125 (1974). Second, the Court's own criticism of its decision in *Avco* causes us to question the applicability of the case outside the area of labor relations. *See Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 244-45 (1970).

(Footnote continued on following page)

with our decision here, we decline to follow them. Rather, we reaffirm our decision in *Bailey* and join at least two other circuits and a number of district courts in holding that the issue of federal preemption is merely a defense to state law claims.[11] We can see no reason for treating a defense of federal preemption differently than any other defense based on federal law, and a defense to a state law claim cannot be a ground for removal. *Accord, Johnson v. First Federal Savings & Loan Association,* 418 F.Supp. 1106, 1109 (E.D.Mich. 1976). As the Supreme Court stated in *Arkansas v. Kansas & Texas Coal Co.,* 183 U.S. 185 (1901), "When Federal questions arise in cases pending in the state courts, those courts are competent, and it is their duty, to decide them." *Id.* at 190-91. We know of nothing in the intervening years to cause us to doubt the state court's ability to apply federal law here.

We hold, therefore, that *Illinois v. Kerr-McGee Chemical Corp.,* No. 81-1110, was improperly removed to federal court. The order of the district court denying remand of the state's case is REVERSED, and the case is REMANDED to the district court with instructions to remand it to the state court.[12]

(Footnote continued from preceding page)

Finally, we do not think the Supreme Court in *Avco* intended to effect a wholesale expansion of the federal courts' removal jurisdiction without so much as mentioning over eighty years of judicial precedent to the contrary. *See* cases cited in note 8 *supra. Accord, First Nat'l Bank v. Aberdeen Nat'l Bank,* 627 F.2d 843, 852-53 (8th Cir. 1980).

[11] *See, e.g., First Nat'l Bank v. Aberdeen Nat'l Bank,* 627 F.2d 843, 853 (8th Cir. 1980); *Washington v. American League of Professional Baseball Clubs,* 460 F.2d 654, 660 (9th Cir. 1972); *Turner v. Bell Fed. Sav. & Loan Ass'n,* 490 F. Supp. 104, 105 (N.D.Ill. 1980); *Connecticut v. Levi Strauss & Co.,* 471 F.Supp. 363, 367 (D.Conn. 1979); *Nevada v. King,* 463 F.Supp. 749, 751 (D.Nev. 1979); *Johnson v. First Fed. Sav. & Loan Ass'n,* 418 F.Supp. 1106, 1109 (E.D.Mich. 1976).

[12] Because the state's case should not have been removed from state court to federal court, the district court's consideration of the issue of preemption with regard to the state's case was improper.

II

City of West Chicago v. Kerr-McGee Chemical Corp., No. 81-1152

The City of West Chicago appeals the dismissal of its suit on the ground of preemption, arguing that federal law does not preempt the city's authority to enforce local ordinances and to abate public nuisances.[13] For the reasons set forth below, we find that the city's suit against Kerr-McGee is not barred by federal preemption.

A

Although the basic rules governing whether or not federal law has preempted state law in a particular area are relatively easy to understand, the application of these rules to specific situations is difficult. One begins with the presumption that an act is valid if done in exercise of a state's legitimate police powers. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Kelly v. Washington*, 302 U.S. 1, 10 (1937). This is particularly true when a state acts to promote public health and safety. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960). Thus preemption of the states' police powers by federal statute must not be assumed,

[13] Kerr-McGee had the city's suit removed from state to federal court on the grounds that the complaint raised a federal question and that there is diversity of citizenship between the parties. We express no opinion on the federal question issue, for it appears that removal was proper under the federal court's diversity jurisdiction. Kerr-McGee is a Delaware corporation with its principal place of business in Oklahoma. The City of West Chicago is an Illinois municipal corporation. It is well-settled that, for the purposes of determining diversity jurisdiction, a corporation is deemed a citizen of its state of incorporation and of the state where it has its principal place of business, and a municipal corporation is a citizen of the state which creates it. *See* 1A MOORE'S FEDERAL PRACTICE ¶ 0.161 [3.-1], at 581-82 (2d ed. 1981).

but exists only if " 'that was the clear and manifest purpose of Congress,' " *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903, 919 (9th Cir. 1981), or if there is a direct conflict between federal and state law that cannot be reconciled. *Kelly v. Washington*, 302 U.S. 1, 10 (1937). Courts are not to seek out conflicts where none necessarily exist, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960), and even when federal law is found to be preemptive, state law is invalid only to the extent that it clearly has been preempted. *See Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903, 919 (9th Cir. 1981).

Congress may evince a purpose to preempt state law in three ways. First, Congress may expressly state that federal authority over a particular subject is to be exclusive. Second, federal preemption may be inferred from the language of the statute, the legislative history, or the objects of the federal regulatory scheme. Finally, if it is impossible to comply with both federal and state law, federal law will prevail and state law must yield. *See Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1146-47 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).[14] With these factors in mind, we turn to an examination of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, and the extent to which it has preempted state and local law.

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[14] Similar principles of federal preemption have applied since the birth of the republic. As Alexander Hamilton said in THE FEDERALIST:

> The principles established in a former paper teach us that the States will retain all *preexisting* authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible.

THE FEDERALIST No. 82 (A. Hamilton)(Modern Library Edition) at 534-35 (footnote omitted).

B

The history of the regulation of atomic energy and its hazards in the United States has been explored thoroughly elsewhere.[15] Here we shall include only a brief recital of the pertinent facts. The original Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 755, created a government monopoly over atomic energy and radioactive materials, primarily because of their use in weapons development. By 1954, however, Congress had recognized the value of the peaceful uses of atomic energy. Congressional policy behind the Atomic Energy Act of 1954, therefore, was to encourage private development of that form of energy. 42 U.S.C. § 2011. The federal government's monopoly over nuclear materials was to be shared only with those who complied with the strict licensing scheme administered by the Atomic Energy Commission. Not until 1959 did Congress create a role for the states in the regulation of atomic energy and its hazards. What is now 42 U.S.C. § 2021 clarified the areas of state and federal responsibility and set out the circumstances under which the Commission would relinquish its authority over certain aspects of atomic energy regulation.[16]

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[15] *See, e.g., Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1147-49 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972); Murphy & LaPierre, *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 COLUM. L. REV. 392, 394-415 (1976); Estep & Adleman, *State Control of Radiation Hazards: An Intergovernmental Relations Problem*, 60 MICH. L. REV. 41, 42-44, 58 (1961).

[16] It should be noted that the Atomic Energy Act is unlike most federal statutes that preempt state law. In the usual case, federal law steps in to preempt an area traditionally reserved to state regulation. The regulation of atomic energy and its hazards, on the other hand, began as the exclusive province of the federal government. Only gradually have the states been allowed to play a part. Analysis of the preemptive effect of other federal legislation is, therefore, not very helpful in resolving the issue here.

The section of the current Atomic Energy Act most relevant to the question of federal and state regulation of the hazards associated with atomic energy is 42 U.S.C. § 2021. Section 2021(b) provides for agreements between the states and the Commission under which the state can assume much of the Commission's regulatory authority "for the protection of the public health and safety from radiation hazards." 42 U.S.C. § 2021(b). Because Illinois has not entered into such an agreement, it appears that the Commission has surrendered none of its authority to regulate nuclear materials or their hazards within the state. Section 2021(k), however, states that "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k). Thus, regardless of whether or not a state has entered into a § 2021(b) agreement with the Commission, the state retains its authority to regulate non-radiation hazards.[17]

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[17] We recognize that other sections of the Atomic Energy Act may appear to conflict with the retention of limited regulatory authority by the states as mandated in 42 U.S.C. § 2021(k). *See, e.g.*, 42 U.S.C. § 2114(a)(1) (giving the Commission the power to protect the public from both the radiological and non-radiological hazards of certain byproduct materials). Such conflicts are inevitable in a complicated and much-amended statute such as the Atomic Energy Act. We are guided, however, by the Supreme Court's admonition that "[s]tatutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250 (1970). Furthermore, repeals by implication are disfavored. If statutory provisions are capable of coexistence, courts must give effect to each. *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, 265-66 (1975). Recognizing these principles, we believe that our interpretation of § 2021 correctly states the intent of Congress without doing violence to other sections of the Atomic Energy Act.

The legislative history of the bill that contained what became 42 U.S.C. § 2021 sheds further light on federal and state responsibilities in the area of atomic energy regulation. In the Senate report, the committee recognized "the dangers of conflicting, overlapping, and inconsistent standards in different jurisdictions, to the hinderance [*sic*] of industry and jeopardy of public safety." S. REP. NO. 870, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2872, 2879. The committee made it clear that:

> It is not intended to leave any room for the exercise of dual or concurrent jurisdiction by States to control radiation hazards by regulating byproduct, source, or special nuclear materials. The intent is to have the material regulated and licensed either by the Commission, or by the State and local governments, but not by both.

Id. The same reports' description of the purpose of subsection (k), however, made it equally clear that the states were to retain their authority to regulate non-radiation hazards.

> Subsection k. provides that nothing in the new section 274 [§ 2021] shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards. This subsection is intended to make it clear that the bill does not impair the State authority to regulate activities of AEC licensees for the manifold health, safety, and economic purposes other than radiation protection. As indicated elsewhere, the Commission has exclusive authority to regulate for protection against radiation hazards until such time as the State enters into an agreement with the Commission to assume such responsibility.

Id. at 2882-83.

The NRC's regulations establish that the Commission's view of its own jurisdiction is consistent with the language of the statute and the Senate report. The Commission repeatedly claims exclusive authority "to license or regulate, from the standpoint of radiological health and safety, byproduct, source,

and special nuclear material or production and utilization facilities" in non-agreement states. 10 C.F.R. § 8.4(j). The Commission does not state, however, that its authority extends to the regulation of non-radiation hazards.

The few cases interpreting the rights of the states and the federal government to regulate atomic energy and its related hazards support the view that the Atomic Energy Act does not totally preempt state law as to non-radiation hazards. In *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972), a nuclear-fueled electric generating plant on the banks of the Mississippi River was operated under a permit from the AEC. Despite this permit, the State of Minnesota attempted to impose more stringent limitations on radioactive effluents from the plant than were imposed by the AEC. In finding Minnesota's regulations preempted by federal law, the Eighth Circuit held that a state has no authority to regulate radiation hazards unless it has entered into an agreement pursuant to 42 U.S.C. § 2021(b). *Id.* at 1148-49. Because radioactive discharges from a nuclear power plant clearly constituted a radiation hazard, regulation of those effluents was the exclusive responsibility of the AEC.[18]

In a more recent opinion, *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903 (9th Cir. 1981), the Ninth Circuit agreed with the Eighth Circuit in *Northern States* that Congress intended the Atomic Energy Act to preempt state regulation of radiation hazards, but further held that the states retained the authority to regulate other matters. *Id.* at 923. The Ninth Circuit rejected challenges to a California statute that required utilities to submit three alternate sites for proposed power plants and that declared a temporary moratorium on the construction of any new nuclear power plants. The three-site rule and the

[18] Although the Supreme Court merely affirmed *Northern States* without opinion, 405 U.S. 1035 (1972), it subsequently reasserted its adherence to the holding of that case in *Train v. Colorado Pub. Interest Research Group*, 426 U.S. 1, 14-17 (1976).

moratorium provision were held to be legitimate exercises of the state's authority to regulate the generation of electricity in the public interest. *Id.* at 925. Moreover, the statute was found not to impinge on the exclusive federal control of radiation hazards. *Id.* at 925-26. California's regulatory scheme was therefore not preempted by federal law.

Thus, an examination of the Atomic Energy Act, the relevant sections of its legislative history, NRC regulations, and the two major cases, reveals that the Commission has exclusive authority to regulate radiation hazards associated with the materials and activities covered by the Atomic Energy Act unless the state has agreed to assume some of the responsibility for that regulation. Even absent such an agreement, however, the state retains the right to regulate non-radiation hazards. In line with the opinions in *Northern States* and *Pacific Legal Foundation*, we hold that the Atomic Energy Act has expressly and impliedly preempted regulation by the states of the radiation hazards associated with nuclear materials. Regulation of non-radiation hazards by the states or their political subdivisions has not, however, been preempted. We think it unwise to formulate in abstract terms the distinction between radiation hazards and non-radiation hazards. We must, therefore, examine closely the facts of this case to determine whether the City of West Chicago's suit against Kerr-McGee is barred by federal preemption.

C

The city's complaint alleges violations of state law and city ordinances by Kerr-McGee with regard to two distinct problems. Counts I through V concern the buildings and grounds at Kerr-McGee's West Chicago facility. Counts VI and VII relate to the alleged dumping of industrial byproducts by Kerr-McGee or its predecessors at various places throughout the City of West Chicago. Because these two sets of allegations raise different factual and legal considerations, we will consider them separately.

I

Counts I through V of the city's complaint allege a number of dangerous conditions existing at Kerr-McGee's factory site in West Chicago:

> 10. The said current conditions which exists [*sic*] on the factory area are as follows:
>
> a) open pits filled with refuse and chemicals
>
> b) holes in floors two through four of building nine, averaging three feet in diameter
>
> c) loose glass in windows
>
> d) broken glass on pavement below windows
>
> e) boards off windows
>
> f) animal litter scattered throughout the buildings
>
> g) fallen walls, debris, abandoned equipment and chemicals
>
> h) fallen, collapsed, and sagging roofing
>
> i) scattered empty beer cans and bottles
>
> 11. The said current conditions include accessibility by the public through and over fences, and no lighting exists in a majority of the buildings.

City of West Chicago's Brief, App. at 7. The city alleges that these conditions constitute a public nuisance and render the buildings "unsafe structures" in violation of city ordinances.[19]

[19] The city claims authority to bring this suit under various Illinois statutes granting municipalities the right to define, prevent, and abate nuisances, ILL. REV. STAT. ch. 24, § 11-60-2; to cause the demolition, repair, or enclosure of dangerous and unsafe buildings, ILL. REV. STAT. ch. 24, § 11-31-1; and to seek an injunction to force compliance with municipal ordinances in the interest of public health and safety, ILL. REV. STAT. ch. 24, § 11-31-2.

Nothing in the city's complaint mentions the radiation hazards that may exist at Kerr-McGee's West Chicago facility, nor is there any attempt to directly regulate radioactive materials. The prayer contained in each of the five Counts requests only the imposition of a civil penalty and that the violation be corrected and the nuisance abated "in compliance with the rules, regulations, procedures and ordinances of all interested governmental entities." *See, e.g., id.* at 8.

Kerr-McGee argues that the city's suit necessarily impinges upon the Commission's authority to regulate the radiation hazards associated with the West Chicago facility. We do not agree. None of the alleged violations directly involved radiation hazards. Nothing in the record indicates that the measures necessary to remedy the alleged violations would interfere with NRC regulation of radiation hazards. However, to the extent that it is established on remand that an *actual* conflict exists between the Commission's authority and the city's suit, the Commission must, of course, prevail.

Given our ruling that the authority of state and local governments to regulate non-radiation hazards has not been preempted by federal law, the city has set forth actionable claims under common law and city ordinances in Counts I through V of its complaint and may proceed with its suit concerning Kerr-McGee's West Chicago facility.

2

Counts VI and VII of the city's complaint allege that at some point certain industrial byproducts were removed from Kerr-McGee's West Chicago facility and deposited by Kerr-McGee or its predecessors as fill in various places throughout the City of West Chicago. The city has identified seventy-five such off-site dumps where the public right to use and enjoy the property has been infringed. The city claims the dumping of

hazardous material as fill constitutes reverse condemnation of public property and the creation of a public nuisance. We do not believe the doctrine of reverse condemnation applies in this instance[20] and consider only the city's nuisance claim.

We cannot determine from the record whether these off-site dumps pose radiation or non-radiation hazards. We will assume for the purposes of this discussion that both types of hazards are involved. If the off-site dumps indeed constitute a radiation hazard, the NRC would appear to have exclusive authority to regulate that hazard. Under 42 U.S.C. § 2280, the Commission is authorized to seek a permanent or temporary injunction against a person who, in the judgment of the Commission, "has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this chapter, or any regulation or order issued thereunder." *Id.* The language of the section clearly authorizes the granting of an injunction directed at past conduct as well as continuing conduct. This conclusion is reinforced by the NRC's own regulations, which state that the Commission may seek an injunction or other court order against any violation of the Atomic Energy Act or regulations issued thereunder. 10 C.F.R. § 20.601. These provisions, coupled with the NRC's exclusive authority to regulate radiation hazards, lead us to believe that

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[20] A reverse or inverse condemnation action is one brought by a landowner whose land has been appropriated in some fashion by a public agency for public use without any compensation being paid to the landowner. Kerr-McGee is not a public agency with any eminent domain powers, nor has there been any appropriation of land for public use. The doctrine of reverse or inverse condemnation, therefore, is not appropriately applied in this suit. *See, e.g., Dep't of Transp. v. Shaw*, 36 Ill. App. 3d 972, 981-82, 345 N.E.2d 153, 160 (1976), *aff'd in part and rev'd in part*, 68 Ill. 2d 342, 369 N.E.2d 884 (1977); Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of the Legislative Power*, 19 STAN. L. REV. 727, 730-31 (1967); Mandelker, *Inverse Condemnation; The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3, 3-6 (1966).

the NRC could exercise control over the radiation hazards associated with the off-site dumps.

The city's brief and the record in this case, however, include a series of memoranda generated by the NRC in which the Commission asserts that it has no authority to require Kerr-McGee to clean up the off-site contamination that has occurred in the City of West Chicago. *See* City of West Chicago's Brief, App. at 27-36. It is unclear from the record why the Commission believes it lacks such authority over these unlicensed dumps, although there is some indication that the dumping may have occurred before the Atomic Energy Act and its regulatory scheme took effect. *See* City of West Chicago's Brief, App. at 27, 31-32. Despite the NRC's asserted lack of authority to require clean-up of the off-site dumps, the memoranda indicate that any action which is taken affecting the off-site materials must be done pursuant to a license issued by the NRC.

Kerr-McGee argues that exclusive NRC jurisdiction over radiation hazards and the fact that any clean-up would require a Commission license mean that only the NRC has any authority over the dump sites and that state remedies are preempted. Therefore the fact that the NRC might be unable to require any clean-up of the off-site contamination is unimportant. We disagree. When Congress gave the Commission exclusive authority to regulate radiation hazards, it did not intend to create a situation in which some hazards could go unremedied. Congress' concern was to avoid dual regulation of radiation hazards. *See* S. REP. NO. 870, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2872, 2879. We can find no expression of a congressional intent to leave certain hazards beyond the scope of any control whatsoever.[21]

[21] We find support for our position in the recent case of *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908 (10th Cir. 1981). There the Tenth Circuit approved the imposition of tort liability for property damage that had occurred as a result of the escape of a quantity of plutonium from a nuclear plant site. At least one reason for the court's ruling was that the NRC had no power to award compensation to a victim of such an incident, yet such a remedy is clearly needed. *Id.* at 920.

Indeed, such a result would be absurd given the enduring and potentially destructive hazards posed by radioactive materials.[22]

On the basis of the record that is before us, it is impossible to determine whether the NRC does indeed have jurisdiction to order the clean-up of the off-site materials. On remand, the district court must decide this question based on its findings as to the nature of the materials at the off-site locations and, if relevant, the dates when the dumpings occurred. To the extent that the court finds that the NRC is without power to require the clean-up of the hazards of the off-site dumps, whether radiological or non-radiological, the City of West Chicago can maintain its suit against Kerr-McGee for the alleged nuisance. To the extent that the NRC does have the authority to regulate the radiation hazards associated with such sites, the city's attempts at independent regulation are, of course, preempted. If the off-site dumps pose any non-radiation hazards, the city may pursue its own remedies only to the extent that they do not conflict with NRC regulation of radiation hazards.

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[22] It is entirely possible that the NRC has exclusive authority to regulate any disposition of these materials that actually occurs, but is without authority to *require* that action be taken to protect the public health and safety from these alleged hazards absent a licensing request. The city's only recourse then might be to begin the potentially costly clean-up itself under license from the NRC. If Kerr-McGee or one of its predecessors is responsible for the off-site contamination, such a result would be intolerable. Kerr-McGee cannot avoid answering the city's suit by retreating behind so uncertain a claim of federal preemption.

We note with approval the statements made at oral argument by Kerr-McGee's counsel to the effect that Kerr-McGee has offered to assist in the clean-up of the off-site dumps. Such benevolent expressions of intent are to be encouraged and may be helpful in settlement negotiations, but they are irrelevant to our determination of whether or not the city's nuisance action has been preempted by federal law.

The order of the district court dismissing the city's suit is, therefore, REVERSED and the case of *City of West Chicago v. Kerr-McGee Chemical Corp.*, No. 81-1152, is REMANDED to the district court for further proceedings consistent with this opinion.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois
Eastern Division

People of the State of Illinois,
Plaintiff,

v.

Kerr-McGee Chemical Corporation,
Defendant.

No. 80 C 2776

MEMORANDUM OPINION AND ORDER

This action was commenced in the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois. Defendant removed the matter to this court on the ground of the presence of a federal question. Presently before the court is plaintiff's motion to remand. For the reasons which follow, the motion to remand is denied.

The complaint is comprised of nine counts, each of which states a cause of action under Illinois law. Counts I-IV, VI and VII are based upon the Environmental Protection Act, Ill.Rev.Stat. Ch. 111½, §§ 1001 *et seq.*, and rules promulgated thereunder. Count V is based upon the Illinois Refuse Disposal Act, Ill.Rev.Stat. Ch. 111½, §§ 470 *et seq.* (repealed July 1, 1970). Count VIII is based upon the Public Nuisance Act, Ill.Rev.Stat. Ch. 100½, § 26. Count IX states a claim based upon the common law assertable by the Attorney General as a result of Article 5, § 15 of the Illinois Constitution and Ill.Rev.Stat. Ch. 14, § 12.

The primary thrust of the complaint is defendant's allegedly improper disposal of dangerous chemical compounds. One ingredient of some of the compounds is thorium, a radioactive element. Defendant maintains that the regulation of thorium is within the exclusive province of the Nuclear

Regulatory Commission ("NRC") pursuant to the Atomic Energy Act, 42 U.S.C. §§ 2011, *et seq.* Defendant's plant and ancillary facilities are licensed by the NRC and are subject to regulations promulgated by the NRC. Therefore, defendants maintains, state regulation has been preempted by federal law; as a consequence, plaintiff's claims raise substantial federal issues providing the basis of this court's original and removal jurisdiction. In support of the motion to remand, plaintiff contends that because it has not pleaded the application of federal law, federal jurisdiction does not exist. However, the federal district courts, being courts of limited constitutional and statutory jurisdiction, have the duty to inquire into the propriety of the exercise of their jurisdiction. *American Fire & Casualty v. Finn,* 341 U.S. 6 (1957); *California v. LaRue,* 409 U.S. 109 (1972).

As a general rule, the federal issues must be apparent on the face of the complaint, unaided by the answer or petition for removal. *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667 (1950). Plaintiff may not, however, defeat original federal jurisdiction, hence, removal jurisdiction, by adroitly avoiding the citation of federal issues or authority in the complaint. *See Rettig v. Arlington Heights Federal Savings & Loan Association,* 405 F.Supp. 819, 823 (N.D. Ill. 1975) and the cases cited therein. It is for these reasons that the court reaches the issues of preemption and the application of federal statutes and regulations.

Plaintiff contends that federal preemption is merely a defense; the federal issues are not essential elements of the cause of action as required by 28 U.S.C. § 1331.

Decisions involving § 1331 have tested jurisdiction in terms of the presence of an issue calling for the interpretation of federal law, as an integral part of the plaintiff's claim. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting); *see e.g., Gully v. First National Bank,* 299 U.S. 109 (1936). It has been held sufficient that

some aspect of federal law be essential to the plaintiff's success, *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), although it is occasionally stated that the cause of action must be derived from federal law. *See American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). As Justice Frankfurter pointed out in his dissent in *Lincoln Mills*, "the litigation-provoking problem has been the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote," 353 U.S. at 470, or raised as, or in anticipation of, a defense. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

The case most utilized in determining whether federal question jurisdiction exists is *Gully v. First National Bank*, 299 U.S. 109 (1936). *Gully* was a suit to collect taxes imposed on a national bank by a state. Writing for a unanimous Court (one Justice taking no part in the decision), Justice Cardozo stated that "[t]he right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." *Id.* at 112. Thus, the federal issue must be a direct element of the plaintiff's claim. One commentator has suggested that for original federal question jurisdiction to arise, there must be "a substantial claim founded 'directly' upon federal law." Mishkin, *The Federal "Question" in the District Courts*, 53 Col.L.Rev. 157, 159 (1953).

With this background established, the test for determining whether original federal question jurisdiction exists under 28 U.S.C. § 1331 may be stated as follows: A suit arises under the Constitution, laws or treaties of the United States where it actually and substantially involves a dispute or controversy concerning the validity or interpretation of such federal issues, the determination of which will have a direct impact on the plaintiff's success or failure.

Plaintiff's argument that preemption is merely a defense has superficial appeal. The cause of action is for illegal

pollution, prohibited by Illinois law; no mention is made of federal law. Defendant may raise on motion or in its answer the preemption argument. As was held in *Louisville & Nashville R.R. v. Motley,* 211 U.S. 149 (1908), the fact that a defense raising federal issues may be availing does not mean that there exists original federal jurisdiction. Upon closer examination, however, the application of this argument to the facts of this case becomes clearly illusory.

While preemption is categorized a defense, it is fundamentally different from a challenge on the merits or a defense of confession and avoidance. The latter two admit the statement of a cause of action but deny plaintiff's right to relief. Federal preemption, on the other hand, means that federal law supplants state law as the ground for plaintiff's cause of action and right to recover. As a result of federal preemption, if in fact the defense has merit, the plaintiff's claim becomes one which actually and substantially involves a dispute or controversy concerning the validity or interpretation of federal issues whose resolution will have a direct impact on plaintiff's success or failure. Thus, original jurisdiction exists and the case is removable. *See* 14 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure § 3722 (1976); 1A Moore's Federal Practice ¶ 0.160 (2d ed. 1979).

The issue on this motion to remand, therefore, is whether state regulation of thorium-bearing compounds has been preempted by federal law. If so, the motion must be denied.

Federal regulation of radioactive materials is extensive. *See* Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.;* Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §§ 7901 *et seq.;* Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* It has been held that state regulation of the discharge of radioactive effluents has been preempted. *Northern States Power Company v. State of Minnesota,* 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.,* 405 U.S. 1035 (1972). Judge Hubert L. Will, in a case involving this defendant for its

alleged discharge of hazardous waste, held that state common law doctrines of nuisance have been preempted by federal regulations. *Coyne v. Kerr-McGee Chemical Corp.*, No. 76 C 2472 (N.D. Ill. February 11, 1977) (order granting defendant's motion for summary judgment). We are in full agreement with, and hereby adopt, the reasoning and result reached by Judge Will.

The pervasive federal regulatory and statutory scheme regarding radioactive waste disposal precludes the application of state nuisance doctrines and general pollution control laws.

Therefore, plaintiff's cause of action, if any, involves the interpretation and application of federal law. Federal original jurisdiction exists under 28 U.S.C. § 1331; the action was properly removed under 28 U.S.C. § 1441(b).

For these reasons, plaintiff's motion to remand is denied.

ENTER:

/s/ Frank J. McGarr
United States District Judge

DATED: August 15, 1980

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 2, 1982.

Before

Hon. HARLINGTON WOOD, Jr., *Circuit Judge*
Hon. WESLEY E. BROWN, *Senior District Judge**

People of the State of Illinois,
Plaintiff-Appellant,

No. 81-1110 *vs.*

Kerr-McGee Chemical Corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80 C 2776

Frank J. McGarr,
Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by counsel for defendant-appellee, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing.** Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Wesley E. Brown, Senior District Judge for the District of Kansas, is sitting by designation.

** The Honorable Robert A. Sprecher, a member of the original panel, passed away before the petition was considered by the court.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

May 24, 1982

Anne Rapkin
Assistant Attorney General
Environmental Control Division
Attorney General's Office
188 W. Randolph
Chicago, IL 60601

Appeal No. 81-1110
In Re: People of the State of Illinois, Plaintiff-Appellant, v. Kerr-McGee Chemical Corporation, Defendant-Appellee.

Dear Ms. Rapkin:

The Court has directed the Clerk to notify counsel for the plaintiff-appellant in the above entitled appeal to file an answer to the petition for rehearing with suggestion for rehearing en banc, filed herein by counsel for the defendant-appellee. Twenty-five copies of that answer, not to exceed 15 pages in length and bound by the same color cover as your brief, will be required; they will be due on June 3, 1982.

Sincerely yours,

/s/ Thomas F. Strubbe
Thomas F. Strubbe
Clerk

TFS/sls
cc: R. R. Wilfong
Kerr-McGee Corporation
Post Office Box 25861
Oklahoma City, OK 73125
Requested by Judge Harlington Wood, Jr.

IN THE CIRCUIT COURT FOR THE 18TH JUDICIAL CIRCUIT

Du Page County, Illinois

People of the State of Illinois,
Plaintiff,

v.

Kerr-McGee Chemical Corporation, a Delaware corporation,
Defendant.

No. 80CH 298

COMPLAINT FOR INJUNCTION AND STATUTORY PENALTIES

NOW COMES Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, by its attorney, WILLIAM J. SCOTT, Attorney General of the State of Illinois, and complains of Defendant KERR-MCGEE CHEMICAL CORPORATION as follows:

COUNT I

1. This is an action for injunctive relief and a statutory civil penalty brought by WILLIAM J. SCOTT, Attorney General of the State of Illinois, on behalf of the PEOPLE OF THE STATE OF ILLINOIS, pursuant to Section 42 of the Illinois Environmental Protection Act ("Act"), Ill. Rev. Stat. (1977) ch. 111½, § 1042.

2. Defendant, KERR-MCGEE CHEMICAL CORPORATION, is a Delaware corporation licensed to do business in Illinois and doing business in DuPage County, Illinois.

3. Defendant owns and manages a site ("site") in the City of West Chicago, DuPage County, Illinois, of approximately 43 acres. The site is bounded on the north approximately by Ann Street, on the west approximately by the Elgin, Joliet and Eastern Railroad, on the south approximately by Roosevelt Road, and on the northeast approximately by Factory Street and Weyrauch Street.

4. Defendant purchased the site in or around 1967 and ceased manufacturing activities at the site in or around 1973.

5. The site consists of approximately 8 acres containing factory and other buildings ("factory area"), approximately 27 acres used for waste disposal ("disposal area"), and approximately 8 acres between the disposal area and factory area ("intermediate area").

6. Defendant and its predecessor companies operated the site since 1932 to manufacture a variety of chemical compounds containing thorium, a naturally occurring radioactive element, and rare earth elements. The chemical compounds manufactured by Defendant and its predecessors were sold for use in gas light mantles, chemical research and manufacturing, nuclear fuel, color television phosphors, and for other uses.

7. The thorium and rare earth elements were extracted at the site from monazite ore. Extraction and purification of the thorium and rare earths was accomplished by processing with various chemicals, including highly concentrated sulfuric acid, caustic soda, hydrochloric acid, and other highly toxic substances.

8. Manufacturing activities at the site resulted in the production of enormous quantities of process waste, both liquid and solid in nature.

9. Liquid waste was generated at the site at the rate of 400,000 to 600,000 gallons per day, such waste containing approximately 50,000 pounds of dissolved solids. This liquid waste was piped from the factory area to the disposal area and discharged into ponds. The ponds acted as infiltration ponds from which the liquid percolated to the groundwater. Insoluble sediments were deposited on the bottom of the ponds.

10. Solid waste was piled in mounds on the disposal area. Such waste included insoluble sediments removed from the infiltration ponds, ore residues, and contaminated process equipment such as tanks and drums.

11. At the present time, there are at least 549,000 cubic feet of insoluble process waste remaining in the ponds, at least 722,000 cubic feet of process waste piled in mounds, and at least 110,000 cubic feet of contaminated process equipment scattered on the disposal area. In addition, there are approximately 11,000 cubic feet of rare earth chemical compounds stored in a building in the disposal area which will probably have to be disposed of as waste.

12. Section 21(a) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1021(a), *as amended* by P.A. 81-856 and effective January 1, 1980 provides:

[No person shall:]

a. Cause or allow the open dumping of any refuse.

13. The term "open dumping" is defined by Seciton 3(o) (formerly lettered (h)) of the Act, *as amended,* as:

> [T]he consolidation of refuse from one or more sources at a central disposal site that does not fulfill the requirements of a sanitary landfill.

14. Rules 301, 303, 304, 305, 306, 310, 311, 312, 313, 314, 315 and 318 of Chapter 7 of the Illinois Pollution Control Board ("Board") Rules and Regulations govern the design, operation, and maintenance of sanitary landfills for disposal of wastes, including hazardous and liquid wastes.

15. At all times pertinent hereto, Defendant's design, operation and maintenance of the site, as described in Paragraphs 2 through 11 hereinabove, have not complied with the requirements of the said Board Rules.

16. Since January 1, 1980, the effective date of Section 21(a) of the Act, *as amended,* Defendant has continuously failed to comply with the requirements of the said Board Rules and has therefore continuously caused or allowed open dumping of refuse at the site, in violation of such Section.

WHEREFORE Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, prays that this Court:

A. Enter an injunction pursuant to Section 42(d) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1042(d), ordering Defendant to remove all of the waste located at the site in a manner which shall first be approved by the Illinois Environmental Protection Agency and to dispose of said waste in accordance with the laws of this State.

B. Enter judgment against Defendant, pursuant to Section 42(a) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1042(a), imposing a civil penalty of $10,000 for Defendant's violation of the Act and Board regulations thereunder, as set out in Count I hereinabove, and an additional $1,000 for each day during which such violation has continued.

C. Grant such other and further relief as is appropriate under the circumstances.

COUNT II

1. This is an action for a statutory penalty brought by WILLIAM J. SCOTT, Attorney General of the State of Illinois, on behalf of the PEOPLE OF THE STATE OF ILLINOIS, pursuant to Section 42 of the Illinois Environmental Protection Act ("Act"), Ill. Rev. Stat. (1977) ch. 111½, § 1042.

2.-11. As Paragraphs 2 through 11 of Count II of this complaint, Plaintiff realleges and incorporates herein Paragraphs 2 through 11 of Count I of this complaint.

12. Section 21(b) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1021(b) (current version Ill. Rev. Stat. ch. 111½, § 1021(a)), provided:

[No person shall:]

b. Cause or allow the open dumping of any. . . .refuse in violation of regulations adopted by the [Illinois Pollution] Board:

13. The term "open dumping" is defined by Section 3(o) (formerly lettered (h)) of the Act, *as amended,* as:

> [T]he consolidation of refuse from one or more sources at a central disposal site that does not fulfill the requirements of a sanitary landfill.

14. Rules 301, 303, 304, 305, 306, 310, 312, 313, 314, 315 and 318 of Chapter 7 of the Board Rules and Regulations govern the design, operation, and maintenance of sanitary landfills for disposal of wastes, including hazardous and liquid wastes.

15. At all times pertinent hereto, Defendant's design, operation, and maintenance of the site, as described in Paragraphs 2 through 11 hereinabove, did not comply with the requirements of the said Board Rules.

16. Since July 27, 1973, the effective date of the said Board Rules, until December 31, 1979, Defendant continuously failed to comply with the requirements of the said Board Rules and therefore continuously caused or allowed open dumping of refuse at the site, in violation of the said Board Rules and of Section 21(b) of the Act (1977).

WHEREFORE Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, prays that this Court:

A. Enter judgment against Defendant, pursuant to Section 42(a) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1042(a), imposing a civil penalty of $10,000 for Defendant's violation of the Act and Board regulations thereunder, as set out in Count II hereinabove, and an additional $1,000 for each day during which said violation continued.

B. Grant such other and further relief as is appropriate under the circumstances.

COUNT III

1. This is an action for injunctive relief and a statutory civil penalty brought by WILLIAM J. SCOTT, Attorney General of the State of Illinois, on behalf of the PEOPLE OF THE STATE OF ILLINOIS, pursuant to Section 42 of the Illinois Environmental Protection Act ("Act"), Ill. Rev. Stat. (1977) ch. 111½, § 1042.

2.-11. As Paragraphs 2 through 11 of Count III of this complaint, Plaintiff realleges and incorporates herein Paragraphs 2 through 11 of Count I of this complaint.

12. Section 21(e) (formerly lettered (f)) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1021(e), *as amended*, provides:

> [No person shall:]
>
> e. Dispose of any refuse .... except at a site or facility which meets the requirements of this Act and regulations thereunder.

13. The term "disposal" is defined by Section 3(e) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1003(e), as:

> [T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste or hazardous waste into or on any land or water so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

14. Rules 301, 303, 304, 305, 306, 310, 311, 312, 313, 314, 315 and 318 of Chapter 7 of the Board Rules and Regulations govern the design, operation, and maintenance of sanitary landfills for disposal of wastes, including hazardous and liquid wastes.

15. At all times pertinent hereto, Defendant's design, operation, and maintenance of the site, as described in Paragraphs 2 through 11 hereinabove, have not complied with the requirements of the said Board Rules.

16. Since July 27, 1973, the effective date of the said Board Rules, Defendant has continuously disposed of wastes at the site, in violation of the said Board Rules and of Section 21(e) of the Act, *as amended.*

WHEREFORE Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, prays that this Court:

A. Enter an injunction pursuant to Section 42(d) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1042(d), ordering Defendant to remove all of the waste located at the site in a manner which shall first be approved by the Illinois Environmental Protection Agency and to dispose of said waste in accordance with the laws of this State.

B. Enter judgment against Defendant, pursuant to Section 42(a) of the Act, Ill. Rev. Stat. (1977), ch. 111½, § 1042(a), imposing a civil penalty of $10,000 for Defendant's violation of the Act and Board regulations thereunder, as set out in Count III hereinabove, and an additional $1,000 for each day during which such violation has continued.

C. Grant such other and further relief as is appropriate under the circumstances.

COUNT IV

1. This is an action for injunctive relief and a statutory civil penalty brought by WILLIAM J. SCOTT, Attorney General of the State of Illinois, on behalf of the PEOPLE OF THE STATE OF ILLINOIS, pursuant to Section 42 of the Illinois Environmental Protection Act ("Act"), Ill. Rev. Stat. (1977) ch. 111½, § 1042.

2.-11. As Paragraphs 2 through 11 of Count IV of this complaint, Plaintiff realleges and incorporates herein Paragraphs 2 through 11 of Count I of this complaint.

12. The wastes described herein which have been disposed of by Defendant at the site are or include hazardous wastes, in

that such wastes have been contaminated by hazardous chemicals and chemical compounds, including but not limited to barium sulfate, sodium sulfate, sodium chloride, sodium fluoride, sodium phosphate, ammonia, ammonium chloride, ammonium sulfate, ammonium nitrate, calcium chloride, ethylhexyl phosphate, ethylenediaminetetraacetic acid, sulfuric acid, and kerosene.

13. Section 21(d) (formerly lettered (e)) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1021(d), *as amended,* provides:

> [No person shall:]
>
> d. Conduct any refuse-collection or refuse-disposal operations, except for refuse generated by the operator's own activities, without a permit granted by the [Illinois Environmental Protection] Agency upon such conditions, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations adopted thereunder, after the [Illinois Pollution Control] Board has adopted standards for the location, design, operation, and maintenance of such facilities. The above exception shall not apply to any hazardous waste . . . .

14. Chapter 7 of the Board's Rules and Regulations governs waste management and the design, operation and maintenance of sanitary landfills for disposal of wastes, including hazardous and liquid wastes.

15. Rule 202(b)(1) of said Board Rules provides:

> [N]o person shall cause or allow the use or operation of any existing solid waste management site without an Operating Permit issued by the Agency not later than one year after the effective date of these Regulations.

16. The said Board Rules became effective on July 27, 1973.

17. Since July 27, 1974, Defendant has continuously conducted refuse-disposal operations at the site without having first obtained a permit from the Illinois Environmental Protec-

tion Agency, in violation of Board Rule 202(b)(1) and of Section 21(d) of the Act, *as amended.*

WHEREFORE Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, prays that this Court:

A. Enter an injunction pursuant to Section 42(d) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1042(d), ordering Defendant to remove all of the waste located at the site in a manner which shall first be approved by the Illinois Environmental Protection Agency and to dispose of said waste in accordance with the laws of this State.

B. Enter judgment against Defendant, pursuant to Section 42(a) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1042(a), imposing a civil penalty of $10,000 for Defendant's violation of the Act as set out in Count IV hereinabove, and an additional $1,000 for each day during which such violation has continued.

C. Grant such other and further relief as is appropriate under the circumstances.

COUNT V

1. This is an action for a statutory civil penalty brought by WILLIAM J. SCOTT, Attorney General of the State of Illinois, on behalf of the PEOPLE OF THE STATE OF ILLINOIS, pursuant to Section 3.1 of the Illinois Refuse Disposal Law ("Disposal Law"), Ill. Rev. Stat. (1969) ch. 111½, § 473.1 (repealed July 1, 1970).

2. The Attorney General is the legal officer of the State of Illinois, having the powers and duties prescribed by law, Ill. Const. Art. 5, § 15; and having the power and authority to prevent air, land, and water pollution in Illinois, Ill. Rev. Stat. ch. 14, § 12; and having all the power and duties of the Attorney General at common law. This is an action by the

Attorney General pursuant to his powers to institute legal proceedings to abate public nuisances and prevent air, land, and water pollution and to protect the health, safety, and welfare of the People of the State of Illinois.

3.-11. As Paragraphs 3 through 11 of Count V of this complaint, Plaintiff realleges and incorporates herein Paragraphs 2 through 10 of Count I of this complaint.

12. Section 1 of the Disposal Law, Ill. Rev. Stat. (1969) ch. 111½ § 471, provided in pertinent part:

> The Department of Public Health, hereinafter referred to as the Department, shall supervise the operation and maintenance of refuse disposal sites and facilities. . . . The Department shall prepare and adopt and may revise from time to time minimum standards for the location, design, construction, sanitation, operation, maintenance and discontinuance of the operation of refuse disposal sites and facilities and shall adopt such rules and regulations relating to the operation, maintenance, and discontinuance of the operation of refuse disposal sites and facilities as it considers necessary from time to time to carry out this Act.

13. Section 2 of the Disposal Law, Ill. Rev. Stat. (1969) ch. 111½, § 472, provided in pertinent part:

> After the Department has promulgated minimum standards for the location, design, construction, operation, maintenance and discontinuance of the operation of refuse disposal sites and facilities pursuant to Section 1, and except as provided in Section 6 of this Act, no person, firm or corporation, whether public or private, may establish, maintain, conduct or operate a refuse disposal site or facility without first registering that site or facility with the Department. . . .

14. The Illinois Department of Public Health promulgated Rules and Regulations for Refuse Disposal Sites and Facilities ("IDPH Rules") pursuant to the Disposal Law on March 22, 1966.

15. IDPH Rule 1.01 provided:

> All refuse disposal sites or facilities shall be registered with the Illinois Department of Public Health on forms to be provided by the Department.

16. IDPH Rule 3.04 provided:

> Open dumping is prohibited.

17. Articles IV and V of the IDPH Rules governed the standards, operation, and maintenance of sanitary landfills.

18. IDPH Rule 5.08 provided:

> [L]iquid or hazardous substances shall not be discharged to a sanitary landfill until written approval has been obtained from the Department.

19. Section 49 of the Illinois Environmental Protection Act, Ill. Rev. Stat. ch. 111½, § 1049 (1970) provides:

> b. All proceedings respecting acts done before the effective date of this Act shall be determined in accordance with the law and regulations in force at the time such acts occurred. All proceedings instituted for actions taken after the effective date of this Act shall be governed by this Act.
>
> c. All rules and regulations of the ... Department of Public Health relating to subjects embraced within this Act shall remain in full force and effect until repealed, amended, or superseded by regulations under this Act.

20. From approximately 1967 until July 27, 1973, the date of the supercession of the IDPH rules by Chapter 7 of the Board's Rules and Regulations governing waste disposal, Defendant continuously failed to register its disposal facilities with the Department of Public Health, in violation of the Disposal Law and IDPH Rule 1.01, and failed to dispose of its wastes, including liquid and hazardous wastes, in accordance with the IDPH Rules cited hereinabove, in violation of such Rules.

WHEREFORE Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, prays that this Court:

A. Enter judgment against Defendant, pursuant to Section 3.1 of the Disposal Law, Ill. Rev. Stat. (1969) ch. 111½, § 473.1, imposing a civil penalty of $100 per day for each day during which Defendant's violations of the Disposal Law and Department rules thereunder, as set out in Count V hereinabove, continued.

B. Grant such other and further relief as is appropriate under the circumstances.

COUNT VI

1. This is an action for injunctive relief and a statutory civil penalty brought by WILLIAM J. SCOTT, Attorney General of the State of Illinois, on behalf of the PEOPLE OF THE STATE OF ILLINOIS, pursuant to Section 42 of the Illinois Environmental Protection Act ("Act"), Ill. Rev. Stat. (1977) ch. 111½, § 1042.

2.-11. As Paragraphs 2 through 11 of Count VI of this complaint, Plaintiff realleges and incorporates herein Paragraphs 2 through 11 of Count I of this complaint.

12. Section 12(d) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1012(d), provides:

[No person shall:]

d. Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard;

13. The term "contaminant" is defined by Section 3(d) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1003(d), as:

[A]ny solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

14. The term "water pollution" is defined by Section 3(hh) (formerly lettered (n)) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1003(hh), *as amended*, as:

> [S]uch alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurous to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimite uses, or to livestock, wild animals, birds, fish, or other aquatic life.

15. During the time relevant herein, Defendant has deposited upon the site liquid wastes contaminated by various chemicals and chemical compounds, such chemicals and chemical compounds including but not limited to barium sulfate, sodium sulfate, sodium chloride, sodium fluoride, sodium phosphate, ammonia, ammonium chloride, ammonium sulfate, ammonium nitrate, calcium chloride, ethylhexyl phosphate, ethylenediaminetetraacetic acid, sulfuric acid, and kerosene.

16. The depositing of such chemicals and chemical compounds created and continues to create a serious pollution hazard to the ground and surface waters of the State of Illinois.

17. The pollution hazard to the ground water consists in the fact that the millions of gallons of liquid wastes deposited into the ponds at the disposal site have over the years infiltrated into the ground, threatening the water table. In addition, rain and melting snow have percolated, and continue to percolate, through the accumulations of solid waste at the disposal site, thereby becoming contaminated and infiltrating into the ground, threatening the water table. The water table under the site is generally only several feet below the surface. The water table is hydraulically connected to an aquifer lying deeper below the surface; this aquifer is used as a water source by

households in unincorporated areas primarily west and southwest of the site and as a standby water source for the City of West Chicago.

18. The pollution hazard to the surface water of Illinois consists in the fact that water on the surface of the disposal site, resulting from rainfall and melting snow, becomes contaminated by the pollutants thereon and, via a storm sewer originating just north of the site, is discharged into Kress Creek. Kress Creek is a tributary to the DuPage River.

19. Since July 1, 1970, the effective date of the Act, Defendant has continuously created a water pollution hazard by its depositing of contaminants on the site, in violation of Section 12(d) of the Act (1977).

WHEREFORE Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, prays that this Court:

A. Enter an injunction pursuant to Section 42(d) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1042(d), ordering Defendant to remove all of the wastes located at the site in a manner which shall first be approved by the Illinois Environmental Protection Agency and to dispose of said waste in accordance with the laws of this State.

B. Enter judgment against Defendant, pursuant to Section 42(a) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1042(a), imposing a civil penalty of $10,000 for Defendant's violation of the Act, as set out in Count VI hereinabove, and an additional $1,000 for each day during which said violation has continued.

C. Grant such other and further relief as is appropriate under the circumstances.

COUNT VII

1. This is an action for injunctive relief and a statutory civil penalty brought by WILLIAM J. SCOTT, Attorney General of the

State of Illinois, on behalf of the PEOPLE OF THE STATE OF ILLINOIS, pursuant to Section 42 of the Illinois Environmental Protection Act, Ill. Rev. Stat. (1977) ch. 111½, § 1042.

2.-11. As Paragraphs 2 through 11 of Count VII of this complaint, Plaintiff realleges and incorporates herein Paragraphs 2 through 11 of Count I of this complaint.

12. Section 12(a) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1012(a), provides:

> [No person shall:]
>
> a. Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

13. Chapter 3 of the Board's Rules and Regulations pertains to water pollution, and, *inter alia,* establishes standards for chemical constituents allowed in waters of the State of Illinois, including underground and surface waters.

14. Rule 207 of said Board Rules and Regulations provides:

> The underground waters of Illinois which are a present or potential source of water for public or food processing supply shall meet the General and Public and Food Processing Water Supply Standards except due to natural causes.

15. The underground waters at and around the site are a present and potential source of water for public and food processing supply.

16. Rule 204 of said Board Rules and Regulations prescribes Public and Food Processing Water Supply Stan-

dards. Under such Rule the following levels of chemical constituents in such water supplies shall not be exceeded:

Chloride:	250 mg/l
Manganese:	.05 mg/l
Sulfates:	250 mg/l
Total Dissolved Solids:	500 mg/l
Selenium:	.01 mg/l

17. Rule 203 of said Board Rules and Regulations prescribes General Standards. Under such Rule the level of fluoride in underground water shall not exceed 1.4 mg/l.

18. Part IV of the said Board Rules and Regulations prescribes the maximum concentrations of various contaminants that may be discharged to waters of the State of Illinois. Under Rule 408 of such Part IV, the following levels of contaminants shall not be exceeded in an effluent:

Fluoride:	15 mg/l
Manganese:	1 mg/l

19. In or around December 1976, Defendant caused or allowed the underground water at the disposal site to contain concentrations of chloride in excess of 250 mg/l, in violation of Board Rule 204.

20. In or around December 1976, Defendant caused or allowed the underground water at the disposal site to contain concentrations of fluoride in excess of 1.4 mg/l, in violation of Board Rule 203.

21. In or around December 1976, Defendant caused or allowed the underground water at the disposal site to contain concentrations of manganese in excess of .05 mg/l, in violation of Board Rule 204.

22. In or around December 1976, Defendant caused or allowed the underground water at the disposal site to contain concentrations of sulfates in excess of 250 mg/l, in violation of Board Rule 204.

23. In or around December 1976, Defendant caused or allowed the underground water at the disposal site to contain concentrations of total dissolved solids in excess of 500 mg/l, in violation of Board Rule 204.

24. In or around October 1976, Defendant caused or allowed the underground water at the disposal site to contain concentrations of selenium in excess of .01 mg/l, in violation of Board Rule 204.

25. Water on the site, resulting from rainfall and melting snow, enters and at all times pertinent herein has entered a storm sewer originating just north of the site and is discharged therefrom into Kress Creek, a tributary to the DuPage River.

26. In or around March 1974, September 1974, June 1975, and July 1976, Defendant caused or allowed water to be discharged via the said storm sewer into Kress Creek which contained concentrations of fluoride in excess of 15 mg/l, in violation of Board Rule 408.

27. In or around September 1976, Defendant caused or allowed water to be discharged via the said storm sewer into Kress Creek which contained a concentration of manganese in excess of 1 mg/l, in violation of Board Rule 408.

WHEREFORE Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, prays that this Court:

A. Enter an injunction pursuant to Section 42(d) of the Act, Ill. Rev. Stat. (1977), ch. 111½, § 1042(d), ordering Defendant to cease and desist from any further violations of the Act and Board regulations thereunder, as set out in Count VII hereinabove.

B. Enter judgment against Defendant, pursuant to Section 42(a) of the Act, Ill. Rev. Stat. (1977) ch. 111½, § 1042(a), imposing a civil penalty of $10,000 for each of Defendant's violations of the Act and Board regulations thereunder, as set out in Count VII hereinabove.

C. Grant such other and further relief as is appropriate under the circumstances.

COUNT VIII

1. This is an action for an injunction brought by WILLIAM J. SCOTT, Attorney General of the State of Illinois, on behalf of the PEOPLE OF THE STATE OF ILLINOIS, pursuant to the Illinois Public Nuisance Act, Ill. Rev. Stat. (1977) ch. 100½, § 26 ("Nuisance Act").

2. The Attorney General is the legal officer of the State of Illinois, having the powers and duties prescribed by law, Ill. Const. Art. 5, § 15; and having the power and authority to prevent air, land, and water pollution in Illinois, Ill. Rev. Stat. ch. 14, § 12; and having all the powers and duties of the Attorney General at common law. This is an action by the Attorney General pursuant to his powers to institute legal proceedings to abate public nuisances and prevent air, land and water pollution and to protect the health, safety, and welfare of the People of the State of Illinois.

3. The Nuisance Act provides:

It is a public nuisance:

> 1. To cause or suffer . . . filth or noisome substances to be collected, deposited, or to remain in any place, to the prejudice of others.
>
> . . .
>
> 3. To corrupt or render unwholesome or impure the water of any spring, river, stream, pond or lake, to the injury or prejudice of others.

4.-13. As Paragraphs 4 through 13 of Count VIII of this complaint, Plaintiff realleges and incorporates herein Paragraphs 2 through 11 of Count I of this complaint.

14.-17. As Paragraphs 14 through 17 of Count VIII of this complaint, Plaintiff realleges and incorporates herein Paragraphs 15 through 18 of Count VI of this complaint.

18.-26. As Paragraphs 18 through 26 of Count VIII of this complaint, Plaintiff realleges and incorporates herein Paragraphs 19 through 27 of Count VII of this complaint.

27. On various dates since approximately 1967 including but not limited to the dates set forth in Paragraphs 19 through 27 of Count VII, and continuing until the present, Defendant has operated and maintained the site in such manner as to constitute a public nuisance, in that noisome substances have been caused or suffered to be collected and deposited and to remain at the site, and waters of Illinois have been corrupted and rendered impure and unwholesome, to the injury and prejudice of People of the State of Illinois, in violation of the Nuisance Law. Further, unless such public nuisance is abated it will continue to so prejudice and injure the People of the State of Illinois.

WHEREFORE Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, prays that this Court:

A. Enter an injunction ordering Defendant to remove all of the waste located at the site in a manner which shall first be approved by the Illinois Environmental Protection Agency and to dispose of said waste in accordance with the laws of this State.

B. Grant such other and further relief as is appropriate under the circumstances.

COUNT IX

1. This is an action for an injunction brought by WILLIAM J. SCOTT, Attorney General of the State of Illinois, on behalf of the PEOPLE OF THE STATE OF ILLINOIS.

2. The Attorney General is the legal officer of the State of Illinois, having the powers and duties prescribed by law, Ill. Const. Art. 5, § 15; and having the power and authority to prevent air, land, and water pollution in Illinois, Ill. Rev. Stat. ch. 14, § 12; and having all the powers and duties of the Attorney General at common law. This is an action by the Attorney General pursuant to his powers to institute legal proceedings to abate public nuisances and prevent air, land, and water pollution and to protect the health, safety, and welfare of the People of the State of Illinois.

3.-12. As Paragraphs 3 through 12 of Count IX of this complaint, Plaintiff realleges and incorporates herein Paragraphs 2 through 11 of Count I of this complaint.

13.-16. As Paragraphs 13 through 16 of Count IX of this complaint, Plaintiff realleges and incorporates herein Paragraphs 15 through 18 of Count VI of this complaint.

17.-25. As Paragraphs 17 through 25 of Count IX of this complaint, Plaintiff realleges and incorporates herein Paragraphs 19 through 27 of Count VII of this complaint.

26. On various dates since approximately 1967, including but not limited to the dates set forth in Paragraphs 19 through 27 of Count VII, and continuing until the present, Defendant has operated and maintained the site in such manner as to constitute a public nuisance, in that Defendant has rendered impure and unwholesome waters of this State, thus injuring the public health and well-being and interfering with the public right to enjoyment of the waters of the State of Illinois. Further, unless such public nuisance is abated it will continue to so injure the People of the State of Illinois.

WHEREFORE Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, prays that this Court:

A. Enter an injunction ordering Defendant to remove all of the waste at the site in a manner which shall first be approved by the Illinois Environmental Protection Agency

and to dispose of said waste in accordance with the laws of this State.

B. Grant such other relief as is appropriate under the circumstances.

PEOPLE OF THE STATE OF ILLINOIS

WILLIAM J. SCOTT
Attorney General
State of Illinois

By: /s/ John Van Vranken
John Van Vranken
Chief, Northern Region

Of Counsel:

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Received June 2, 1980
H. Stuart Cunningham, *Clerk*
United States District Court

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

People of the State of Illinois, *Plaintiff-Respondent,* *v.* Kerr-McGee Chemical Corporation, a Delaware corporation, *Defendant-Petitioner*	No. 80 C 2776

VERIFIED PETITION FOR REMOVAL

Kerr-McGee Chemical Corporation, defendant-petitioner, by its attorneys, files its petition for removal of this action from the Circuit Court of DuPage County, Illinois, to the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to 28 U.S.C. § 1446 and Rule 3 of the Civil Rules of this Court. In support of its petition, defendant-petitioner states:

1. On April 28, 1980, an action was commenced against defendant-petitioner in the Circuit Court of DuPage County, Illinois, entitled *People of the State of Illinois v. Kerr-McGee Chemical Corporation,* by the filing of a summons and complaint. The summons and complaint (copies of which are attached hereto as Exhibit "A") were served on defendant-petitioner on May 1, 1980. Defendant-petitioner's time for response to the complaint is June 2, 1980. No proceedings have occurred in this action.

2. This action is a civil action of which this Court has original jurisdiction under the provisions of 28 U.S.C. § 1331 and is one which may be removed to this Court by defendant-petitioner pursuant to the provisions of 28 U.S.C. § 1441(a) because:

a) This action arises under the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.* Plaintiff-respondent alleges in each and every count of the complaint as filed that defendant-petitioner and its predecessor companies operated the site in the City of West Chicago, Illinois, for the manufacture of a variety of compounds containing thorium, a radioactive element;

b) Thorium is specifically defined by § 2014(z) of the Atomic Energy Act (42 U.S.C. § 2014(z)) as a "source material." The statute provides that in the absence of conditions inapplicable here possession, use and disposal of such material is exclusively regulated by the Nuclear Regulatory Commission ("NRC") as the successor to the powers and duties of the Atomic Energy Commission (42 U.S.C. §§ 2021(b) and 2201 (b));

c) Consistent with the requirements of the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*, the plant and facilities of the defendant-petitioner, which are the sole subject matter of the complaint filed in this action, were licensed by the Atomic Energy Commission and continue under license by the NRC (see Affidavit attached hereto as Exhibit "B"). Said license is in full force and effect for the defendant-petitioner's site and as a licensed site, all operations and materials there are governed by federal regulations set forth in 10 C.F.R. Part 20;

d) Though plaintiff-respondent's complaint purports to be based upon several state statutes and regulations and state common law, such laws and regulations are preempted by federal law as noted above, pursuant to the Supremacy Clause of the United States Constitution,

Article VI, Clause 2. This Court has so held with respect to the specific site at issue in this action. *Coyne v. Kerr-McGee Chemical Corporation*, 76 C 2472 (N.D. Ill., February 11, 1977).* This holding is consistent with the decisions of all other federal courts which have reviewed the issue, including the United States Supreme Court. E.g., *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 16 (1976); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1154 (8th Cir. 1971), *aff'd.*, 405 U.S. 1035 (1972).

3. The complaint in this action pointedly avoids any reference to federal laws, federal regulations or the fact that defendant-petitioner's site is under license and governed by regulations of the Nuclear Regulatory Commission. However, the decisions of this Court have emphasized that its jurisdiction cannot be circumscribed by the failure of plaintiff-respondent to fully elucidate the applicable jurisdictional facts where federal preemption is at issue, as here. As this Court held in *Rettig v. Arlington Heights Federal Savings & Loan Ass'n.*, 405 F. Supp. 819, 823 (N.D. Ill., 1975):

> "The plaintiff, however, may not defeat removability by attempting to draft the complaint around what is essentially a federal cause of action . . .
>
> "The court therefore may look beyond the verbiage of the state court complaint to the substance of plaintiffs' claimed grievance, and may, where appropriate, properly take judicial notice of any federal laws necessarily brought into play. [Citations omitted.] *Where federal substantive law is found to be controlling either by reason of the exclusive jurisdiction of the federal courts, or federal preemption, the suit is properly removable.*" [Emphasis added.]

Preemption of the subject matter of the action by federal law is the controlling legal issue here since the complaint purports to

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* A copy of the opinion of Judge Will is attached hereto as Exhibit "C".

apply state statutes, common law and regulations to a facility maintained under federal NRC license and exclusive jurisdiction. This action therefore should be removed to this Court.

4. The matter in controversy purportedly exceeds the sum of $10,000, exclusive of interest and costs, from the face of plaintiff-respondent's complaint (Exhibit "A").

5. Defendant-petitioner files herewith a bond with good and sufficient surety in the penal sum of Five Hundred ($500) Dollars, conditioned, as provided by 28 U.S.C. § 1446(d) that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that this action is not removable or is improperly removed.

WHEREFORE, defendant-petitioner prays that the above-described action in the Circuit Court of the State of Illinois in and for the County of DuPage be removed therefrom to this Court for the reasons stated herein.

DATED: June 2, 1980.

/s/ Glenn W. McGee
Glenn W. McGee
John C. Berghoff, Jr.
Pamela J. Kempin
Bill J. Zimmerman
Barbara Hoffman

Attorneys for Defendant-Petitioner
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VERIFICATION

STATE OF ILLINOIS
COUNTY OF DUPAGE } ss.:

GLENN W. MCGEE, being first duly sworn on oath, states that he is one of the attorneys for Petitioner, KERR-MCGEE CHEMICAL CORP., and that he has read the foregoing Verified Petition for Removal and believes the facts alleged therein to be true.

/s/ Glenn W. McGee
Glenn W. McGee

Subscribed and sworn to before
me this 2nd day of June, 1980.

/s/ Susan Kreitman
Notary Public

IN THE UNITED STATES DISTRICT COURT

For The Northern District of Illinois

Eastern Division

People of the State of Illinois,
Plaintiff-Respondent,

v.

Kerr-McGee Chemical Corporation,
A Delaware Corporation,
Defendant-Petitioner.

No.

AFFIDAVIT OF IVAN L. DENNY

IVAN L. DENNY, being duly sworn, on oath, deposes and states as follows:

1. He is Manager, Special Projects, Kerr-McGee Chemical Corporation and has responsibility for managing the proposed decommissioning and stabilization of Kerr-McGee's West Chicago facility, which is the subject of this action. He is familiar with and/or has personal knowledge of matters relating to said facility, its licensing and proposed decommissioning.

2. Based on his information and belief, the West Chicago facility began operations at the present site in 1932 under the ownership of the Lindsay Light and Chemical Company. In 1956, the West Chicago site became subject to the provisions of the Code of Federal Regulations, including 10 C.F.R. Part 20, et seq. pursuant to license issued by the Atomic Energy Commission.

3. After a merger in 1958, the company became the Lindsay Chemical Division of the American Potash and Chemical Corporation and its operations continued uninterrupted under AEC license, supplying thorium and

rare earth compounds to United States Government projects. In 1967, Kerr-McGee acquired all the assets of the American Potash and Chemical Corporation, including the said West Chicago facility. For economic reasons, the facility ceased active operations at the end of 1973.

4. Despite the fact that the facility ceased active operations, Kerr-McGee has been required by the Atomic Energy Commission and its successor federal agency, Nuclear Regulatory Commission, to maintain its status as a fully licensed facility. A true and correct copy of the current license (no. STA-583) and NRC renewal forms is attached hereto as Denny Affidavit Exhibit "A".

5. Kerr-McGee Chemical Corporation has submitted a plan to provide for the decommissioning and stabilization of said facility which, by virtue of federal laws and regulations, must be approved by the Nuclear Regulatory Commission. It is affiant's understanding that no action may be lawfully taken by Kerr-McGee in this respect without federal approval.

FURTHER AFFIANT SAYETH NOT.

/s/ Ivan L. Denny
IVAN L. DENNY

SUBSCRIBED AND SWORN TO before me this 30th day of May, 1980.

/s/ Evan Jackson
NOTARY PUBLIC

MY COMMISSION EXPIRES:
2-12-84

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

People of the State of Illinois, *Plaintiff,* v. Kerr-McGee Corporation, (A Delaware Corporation) *Defendant.*	No. 80-C2776

AFFIDAVIT OF WILLIAM A. NIXON

STATE OF MARYLAND
COUNTY OF MONTGOMERY } ss:

WILLIAM A. NIXON, being duly sworn, deposes and says:

1. I am employed at the Division of Fuel Cycle and Material Safety, NRC Office of Nuclear Material Safety and Safeguards. The statements made in this affidavit are based upon my knowledge and information available to me in my official capacity.

2. Through my official duties as Project Manager I have become familiar with the conditions at and proposed decommissioning of the Kerr-McGee West Chicago Rare Earths Facility ("Rare Earths Facility") located in West Chicago, Illinois.

3. Kerr-McGee Chemical Corporation ("Kerr-McGee") acquired the Rare Earths Facility in 1967. Kerr-McGee and its predecessor companies operated the Rare Earths Facility from 1932 to 1973 to produce chemical compounds containing thorium, a naturally occurring radioactive element, and rare earth elements.

4. Thorium is a "source material" for the purposes of the Atomic Energy Act of 1954, as amended (Act) 42 U.S.C. 2014z,10 CFR 40.4(h). Because the facility processed thorium, it was originally licensed by the Atomic Energy Commission in May 1956 and is now licensed by the Nuclear Regulatory Commission. The material on-site contains tailings from the milling of ore either for its source material content (thorium) or for rare earths recovery. Depending on their thorium content, the tailings are either "byproduct material" or "source material" for the purposes of the Act. Under license No. STA-583, as now effective, Kerr-McGee is authorized to possess and store thorium ores but is not authorized to process thorium.

5. The Rare Earths Facility covers 43 acres divided in three sections: the 8 acre facility site contains processing and other buildings; the 27 acre disposal site contains thorium ore residues and other processing wastes; and the 8 acre linking site connects the other two sites.

6. On October 3, 1975, Kerr-McGee submitted to the NRC a plan for on-site burial of wastes at the Rare Earths Facility. Kerr-McGee withdrew that plan in late 1976 because of concerns expressed by NRC and Illinois state agency representatives.

7. Since late 1976, NRC has been working with Kerr-McGee, Argonne National Laboratory (ANL), and State and local representatives to define the safety and environmental impacts of the site and to determine disposition of the wastes. ANL has submitted reports to the NRC on: analysis of soil and water samples obtained by drilling five holes on the site (July 1977); characteristics of the radioactive and non-radioactive chemical contaminants on the site surface, and assessments of the potential radiological and non-radiological impacts that could be expected from disposal by either on-site burial or by off-site transportation to a licensed burial ground (June 1978).

8. In July 1977, Kerr-McGee agreed to develop a decommissioning plan for the Rare Earths Facility. An amendment to the existing NRC license is required for decommissioning the Rare Earths Facility and stabilizing the thorium wastes at the site.

9. On December 31, 1978, in response to an NRC Order of November 16, 1978, Kerr-McGee submitted a decommissioning plan to the NRC. After receiving public comments on the plan, the NRC on April 10, 1979, requested Kerr-McGee to submit a revised plan including sufficient details to permit NRC to prepare an environmental impact statement.

10. On August 15, 1979, Kerr-McGee submitted a revised plan for decommissioning the facility site and stabilizing the disposal site. Kerr-McGee's preferred plan proposes to demolish and remove all buildings from the factory site and encapsulate the disposal site with clay covered by a layer of topsoil. Kerr-McGee distributed the plan for public comment, discussed it with the West Chicago City Council on August 6, 1979, and held a public meeting on the plan at West Chicago High School on August 8, 1979. The revised plan was reviewed by federal, state and local officials and additional questions and comments were submitted to Kerr-McGee in November 1979. Kerr-McGee responded to the questions and comments by letter dated April 29, 1980, and the review of their submittal is continuing. Additional information is to be received from Kerr-McGee on alternate sites for waste stabilization and disposal.

11. On December 6, 1979, the NRC issued Notice of Availability of Stabilization Plan and Intent to Prepare a Draft Environmental Impact Statement Concerning approval of a plan to Decommission the Rare Earths Facility Located at West Chicago, Illinois. 44 Fed. Reg. 72246 (December 13, 1979). The draft environmental impact

statement will analyze Kerr-McGee's preferred plan to decommission its Rare Earths Facility and alternatives to the preferred plan. The NRC has determined that authorizing decommissioning activities will result in actions which significantly affect the quality of the human environment. NRC is now preparing the draft environmental impact statement.

12. As a separate matter, on July 31, 1979, Kerr-McGee submitted a Radiological Health Safety Plan to the Region III office of the NRC Office of Inspection and Enforcement. That plan, among other things, proposed decontamination of the on-site buildings by removing their radioactive contamination. The plan was submitted in accordance with a July 1976 agreement with the Region III office that no decontamination would be performed prior to approval of the plan by the regional office. The approved plan permits decontamination activities that are common to any decommissioning plan that may be approved and, therefore, does not preclude any particular future action.

/s/ William A. Nixon
WILLIAM A. NIXON

STATE OF MARYLAND }
COUNTY OF MONTGOMERY } ss:

Subscribed and sworn to before me
this 9th day of June, 1980.

/s/ Virginia Lee Thorpe
NOTARY PUBLIC
My Commission Expires July 1, 1982

ARTICLE VI, Clause 2 of the United States Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

42 U.S.C. § 2011. Congressional declaration of policy

Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that—

(a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times

to the paramount objective of making the maximum contribution to the common defense and security; and

(b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

42 U.S.C. § 2014. Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

* * *

(e) The term "byproduct material" means (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

* * *

(z) The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

42 U.S.C. § 2111. Domestic distribution; license; price limitations

No person may transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import, or export any byproduct material, except to the extent authorized by this section, section 2112 or section 2114 of this title. The Commission is authorized to issue general or specific licenses to applicants seeking to use byproduct material for research or development pur-

poses, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed. The Commission may distribute, sell, loan, or lease such byproduct material as it owns to qualified applicants with or without charge: *Provided, however,* That, for byproduct material to be distributed by the Commission for a charge, the Commission shall establish prices on such equitable basis as, in the opinion of the Commission, (a) will provide reasonable compensation to the Government for such material, (b) will not discourage the use of such material or the development of sources of supply of such material independent of the Commission, and (c) will encourage research and development. In distributing such material, the Commission shall give preference to applicants proposing to use such material either in the conduct of research and development or in medical therapy. The Commission shall not permit the distribution of any byproduct material to any licensee, and shall recall or order the recall of any distributed, material from any licensee, who is not equipped to observe or who fails to observe such safety standards to protect health as may be established by the Commission or who uses such material in violation of law or regulation of the Commission or in a manner other than as disclosed in the application therefor or approved by the Commission. The Commission is authorized to establish classes of byproduct material and to exempt certain classes or quantities of material or kinds of uses or users from the requirements for a license set forth in this section when it makes a finding that the exemption of such classes or quantities of such material or such kinds of uses or users will not constitute an unreasonable risk to the common defense and security and to the health and safety of the public.

No. 82-386

Office - Supreme Court, U.S.
FILED
OCT
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KERR-McGEE CHEMICAL CORPORATION,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Attorney General, State of Illinois

JOHN VAN VRANKEN*
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Printed by Authority of the State of Illinois (P.O. 31117—[illegible])

QUESTION PRESENTED

Whether an action in state court based entirely on state law may be removed to federal court solely on the defendant's assertion that such state law is preempted by a federal statute?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KERR-McGEE CHEMICAL CORPORATION,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATUTES INVOLVED

28 U.S.C. §§ 1331(a), 1441(a), and 1447(c). These statutes are set out in the Appendix to this Brief.

STATEMENT OF THE CASE

This action, filed by Respondent People of the State of Illinois ("the State") in state court, concerns the waste disposal activities of Petitioner Kerr-McGee Chemical

Corporation ("Kerr-McGee") at a manufacturing site in West Chicago, Illinois. The complaint alleges that Kerr-McGee and its predecessor companies operated the site from 1932 until 1973 to produce various chemical compounds from thorium- and rare earth-bearing ores. (A 33)[1] The thorium (a radioactive element) and rare earths (nonradioactive elements) were extracted from the ores and purified by processing with various nonradioactive toxic substances. The wastes resulting from the operation were contaminated radiologically by residual thorium and nonradiologically by the chemicals, such as highly concentrated sulfuric acid and hydrochloric acid, used in the extraction and purification process. (A 33, 44)

Liquid wastes from the operations were disposed of by discharge into the ground at the rate of approximately 500,000 gallons a day and solid wastes were piled on the ground. (A 33) Waste material percolating through the ground consequently polluted the ground-water with nonradioactive contaminants, and surface run-off from the site similarly polluted a local stream. (A 44-45, 47-48) Over a million and a half cubic feet of waste remain piled and scattered at the site, posing a continuing threat of nonradioactive chemical contamination of ground and surface waters due to leaching rainwater and surface run-off. (A 33, 44-45)

The complaint alleged that these waste disposal practices, the resulting nonradioactive chemical water pollution, and the continuing nonradioactive chemical water pollution threat violate certain state statutes and common law. The complaint was based solely on state law claims. Kerr-McGee removed the action to federal district court, asserting that state regulation of these waste materials is

[1] "A" refers to the page of Kerr-McGee's Appendix.

preempted by the Atomic Energy Act, 42 U.S.C. §§2011 *et seq.* ("AEA"), under which the Nuclear Regulatory Commission ("NRC") has exclusive authority to regulate, and primary jurisdiction to adjudicate controversies concerning, thorium wastes. Kerr-McGee argued that such preemption gave the court "federal question" jurisdiction under 28 U.S.C. §§1441(a) and 1331(a). On the same federal question ground as well as because of diverse citizenship (28 U.S.C. §1332), Kerr-McGee also removed a state court action by the City of West Chicago ("City") challenging, *inter alia*, under the state and local law, the condition of Kerr-McGee's buildings and grounds (broken windows, scattered beer cans, etc). The district court assumed jurisdiction of both actions and dismissed them, holding that all the claims were preempted.

On appeal the Seventh Circuit consolidated the actions and, with respect to the State's action, held that a defensive assertion of federal preemption to state law claims does not confer federal question jurisdiction. (A 9, 11) In the City's action, the Seventh Circuit reached the merits of the preemption issue and held that while the AEA preempts state and local regulation of radiation hazards, it does not preempt regulation of nonradiation hazards. (A 15, 18) Finding that nothing in the record indicated that the relief sought by the City would interfere with NRC regulation of radiation hazards, the court held that on remand the action will be preempted only to the extent that an actual conflict is shown to exist between the NRC's authority over radiation hazards and the City's authority over other hazards. (A 20, 23) Kerr-McGee has not petitioned for certiorari with respect to the City's action.

REASONS FOR DENYING THE WRIT

I.

The Seventh Circuit Correctly Ordered Remand Because The Complaint Does Not Plead A Federal Cause Of Action

The Seventh Circuit remanded this case because it alleges only state causes of action (A 9) and because Kerr-McGee's defense of federal preemption, like any other defense based on federal law, is not a ground for removal. (A 11). The court correctly considered its decision to be compelled by an unbroken line of Supreme Court cases limiting "federal question" jurisdiction (28 U.S.C. §1331) to those cases in which the complaint pleads a federal cause of action, i.e., a right arising out of federal law. *Phillips Petroleum Co. v. Texaco*, 415 U.S. 125 (1974); *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Gully v. First National Bank*, 299 U.S. 109 (1936); *Arkansas v. Kansas & Texas Coal Co.*, 183 U.S. 185 (1901); *Tennessee v. Union and Planters' Bank*, 152 U.S. 454 (1894).

These cases enunciate the principle that only a federal cause of action, not a defense based on federal law, creates federal question jurisdiction. There are no Supreme Court cases to the contrary. *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), cited by Kerr-McGee, did not permit removal on the basis of a federal preemption defense. There the defendant removed a suit to enforce a collective bargaining agreement. The Court held that removal was proper because Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, gives jurisdiction to federal courts over suits to enforce collec-

tive bargaining agreements, and any applicable state law has not survived the enactment of Section 301. In other words, a complaint which seeks to enforce a collective bargaining agreement necessarily pleads a federal cause of action and is therefore removable. Thus, *Avco* is fully consistent with the Court's traditional approach to federal question jurisdiction.[2]

II.

There Is No Conflict Among The Courts Of Appeals On The Question Presented

By failing to distinguish among the various kinds or effects of "federal preemption," Kerr-McGee has created the illusion that the Courts of Appeals differ on the question whether removal is justified by a defensive assertion that state claims are preempted. Whenever federal law has preempted an area, federal substantive law will govern the parties' rights. However, the fact that federal law may have preempted an area does not necessarily mean that the preempting law has created a cause of action in federal court to vindicate those rights. Th

[2] Kerr-McGee also cites *Federated Dept. Stores v. Moitie*, 425 U.S. 394 (1981), as support for its position. That case, however, is at most of dubious relevance. *Moitie* dealt not with removal but with a res judicata question. The only reference to removal was made in a footnote; there the Court remarked that it would not disturb the lower court's finding on removal that the plaintiffs "had attempted to avoid removal jurisdiction by 'artfully' casting 'essentially federal law claims' as state-law claims." 452 U.S. at 397, n. 2. In his sole dissent Justice Brennan observed that in its "eagerness" to correct the lower court's decision on res judicata, the majority improperly failed to examine the removal question. It is surely correct that the very brief treatment of the removal issue in *Moitie* belies any suggestion that that case reverses or affects the principles of federal jurisdiction adhered to by this Court for the past century.

Courts of Appeals which have permitted removal on the basis of "federal preemption" have done so because the preempting law created a federal cause of action, not because the preempting federal law provided (or was asserted to provide) a defense to state claims. Those appellate decisions cited by Kerr-McGee which did permit removal where federal law was raised merely as a defense have all been reversed, explicitly or implicitly, by subsequent decisions.[3]

The most recent relevant case in the First Circuit appears to be *Brough v. United Steelworkers of America*, 437 F.2d 748 (1st Cir. 1971), which held that a defense of federal preemption does not justify removal even where the state claim is no longer viable because of the preempting federal law.

For the Second Circuit, Kerr-McGee cites *North American Phillips v. Emery Air Freight*, 479 F.2d 229 (2nd Cir. 1978), which does indeed conflict with the Supreme Court authority cited above. However, a subsequent removal case, *Vitarroz v. Borden, Inc.*, 644 F.2d 960 (2nd Cir. 1981), held that only a federal cause of action confers federal jurisdiction. *Vitarroz* thus implicitly overruled *North American Phillips* and explicitly overruled *Beech-Nut, Inc. v. Warner-Lambert Co.*, 480 F.2d 801 (2nd Cir. 1973), also cited by Kerr-McGee. 644 F.2d at 964, n. 2.

The Third Circuit also rejects the notion that a defense of federal preemption is a ground for removal. *Trent Realty Ass'n v. First Fed. Sav. & Loan Ass'n*, 657 F.2d 29 (3rd Cir. 1981).

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[3] Kerr-McGee indicates that the district courts are also in conflict on the issue presented here. If true, that is a problem for the Courts of Appeals, not this Court, to remedy.

The State found no relevant cases, and Kerr-McGee cited none, in the Fourth Circuit.

In the Fifth Circuit, *Till v. Unifirst Fed. Sav. & Loan Ass'n*, 653 F.2d 152 (5th Cir. 1981), permitted removal of a case where the complaint pleaded a federal cause of action under the National Flood Insurance Program. While the plaintiffs ultimately failed to demonstrate that federal law implied a private right of action as claimed, and the case was therefore dismissed, the court stressed that only the pleading of a federal cause of action creates federal jurisdiction.

For the Sixth Circuit, Kerr-McGee cites *McKinney v. International Ass'n of Machinists*, 624 F.2d 745 (6th Cir. 1980). The plaintiffs pleaded two claims, one against their employer for violating their employment contract and the other against their union for violating its duty of fair representation in connection with the circumstances surrounding the first cause of action. Removal was upheld. While the first claim did not state a federal cause of action, the second, as the court made clear, did. The action was therefore removable consistent with the Supreme Court authority cited above and does not support Kerr-McGee's position.

In the Seventh Circuit, the decision below as well as an earlier decision which the Kerr-McGee court explicitly reaffirmed (A 11), *Bailey v. Logan Square Typographers*, 441 F.2d 47 (7th Cir. 1971), held that a federal preemption defense to a state claim does not confer jurisdiction.

In the Eighth Circuit, *First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843 (8th Cir. 1980), rejected a federal preemption defense as a basis for removal. *Lawrence County v. South Dakota*, 668 F.2d 27 (8th Cir. 1982), reaffirmed *Aberdeen*.

In the Ninth Circuit, *Sheeran v. General Elec. Co.*, 593 F.2d 93 (9th Cir. 1979), and *Fristoe v. Reynolds Metal Co.*, 615 F.2d 1209 (9th Cir. 1980), *cert. den.* 444 U.S. 868, cited by Kerr-McGee, were properly removed because like *Avco*, *supra*, they were suits for violation of a collective bargaining agreement. *Meyers v. Beverly Hills Fed. Sav. & Loan Ass'n*, 499 F.2d 1145 (9th Cir. 1974), also cited by Kerr-McGee, did indeed allow removal in the absence of the pleading of a federal cause of action. However, in a subsequent opinion, *Guinasso v. Pacific First Fed. Sav. & Loan Ass'n*, 656 F.2d 1364 (9th Cir. 1981), *cert. den.* 102 S. Ct. 1716, the court noted that in *Meyers* it had not commented on the propriety of removal and overruled that case. The court considered itself bound by its previous cases, including *Washington v. Amer. League of Professional Baseball Clubs*, 460 F.2d 654 (9th Cir. 1972). *Nalore v. San Diego Fed. Sav. & Loan Ass'n*, 664 F.2d 841 (9th Cir. 1981), *cert. den.* 102 S. Ct. 1719, relied on *Guinasso* and *Washington v. Amer. League* in rejecting a federal preemption defense as ground for removal. In view of these developments in the Ninth Circuit, *Lafferty v. Solar Turbines Internat'l*, 666 F.2d 408 (9th Cir. 1982), must be viewed as an anomaly. There the court permitted a removal even though the plaintiffs admitted they had no cause of action under federal law. In *Lafferty*, the court affirmed removal without reference to any judicial authority.

In the Tenth Circuit, *North Davis Bank v. First Nat'l Bank*, 457 F.2d 820 (10th Cir. 1972), improperly permitted removal in the absence of a federal cause of action. Subsequently, however, the court clearly held that a federal preemption defense to a state claim does not create federal jurisdiction. *Madsen v. Prudential Fed. Sav. & Loan Ass'n*, 635 F.2d 797 (10th Cir. 1980), *cert. den.* 451 U.S. 1018.

The State found no relevant cases, and Kerr-McGee cited none, in the Eleventh and Twelfth Circuits.

In summary, there is no real or significant conflict among the Courts of Appeals on the question presented here and thus no need for this Court to grant a writ of certiorari.

III.

The Atomic Energy Act Does Not Preempt State Regulation Of Nonradiation Hazards

Although Kerr-McGee has not expressly petitioned for certiorari as to that portion of the Seventh Circuit's decision concerning preemption, Kerr-McGee seems implicitly to be raising the question whether that decision was correct. Due to the ambiguity of Kerr-McGee's petition, the State, without conceding that such question is properly before this Court, will briefly respond.

The Seventh Circuit correctly ruled that the AEA does not preempt state regulation of nonradiation hazards. The cases cited by Kerr-McGee in support of preemption here, *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *sum. aff'd* 405 U.S. 1035, and *Train v. COPIRG*, 426 U.S. 1 (1976), addressed only the question whether regulation of radiation hazards is preempted. Those decisions held that regulation of such hazards is preempted, but no court has ever extended the AEA's preemptive reach to nonradiation hazards. Indeed, every court which has examined the question has specifically ruled that regulation of nonradiation hazards is not preempted. *New Hampshire v. AEC*, 406 F.2d 170 (1st Cir. 1969); *Pacific Gas & Electric Co. v. State Energy Comm'n*, 659 F.2d 903 (9th Cir. 1981), *cert. granted* 102 U.S. 2956;[4]

[4] *Pacific Gas & Elec. Co.* involves California's "moratorium" on construction of nuclear power plants. The fact situation there and that involved here are thus quite different.

People v. Kerr-McGee Chemical Corp., 677 F.2d 571 (7th Cir. 1982) (decision below); *PASNY v. New York*, No. 77-596 (S.D.N.Y. 1979), CCH Nuc.Reg.Rptr. ¶20,105. The NRC has also consistently held that its exclusive jurisdiction applies only to radiation hazards. *In the Matter of Consolidated Edison Co.*, 7 NRC 31 (1978); *In the Matter of Long Island Lighting Co.*, 9 NRC 51 (1979); *In the Matter of Southern California Edison Co.*, 7 AEC 38 (1974).

Because the State's action addresses only nonradiation hazards, it is not preempted by the AEA. Therefore, consistently with the Seventh Circuit's approach, on remand the State's suit will be preempted only to the extent that an actual conflict is shown to exist between the NRC's authority over radiation hazards and the State's authority over nonradiation hazards. (A 20, 23).[5]

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[5] At pages 3 and 14 of its Petition, Kerr-McGee refers to an NRC Draft Environmental Statement ("DES") which allegedly "recommends that the wastes be encapsulated on the present facility site" and thus implicitly conflicts with the State's lawsuit aimed at requiring removal of the wastes from the site. First, this NRC document is not in the record of this case. It was issued shortly after the decision below, and Kerr-McGee did not bring it to the Seventh Circuit's attention in its Petition for Rehearing. Second, the NRC's alleged recommendation is relevant only to the factual question of conflict and is therefore properly presented to the trial court, not to this Court. Finally, without discussing the substance of the DES, the State completely disagrees with Kerr-McGee's representation as to the DES's recommendation.

CONCLUSION

For the foregoing reasons the State submits that the Court should deny the Petition For A Writ Of Certiorari.

Respectfully submitted,

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APPENDIX

28 U.S.C. §1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. §1441

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. §1447

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

No. 82-386

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IN THE

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KERR-McGEE CHEMICAL CORPORATION,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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No. 82-386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KERR-McGEE CHEMICAL CORPORATION,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

REPLY BRIEF FOR PETITIONER

Petitioner, Kerr-McGee Chemical Corporation, submits this reply to the Brief in Opposition of the Respondent, State of Illinois ("Opp. Cert. ____").

I.

THE RELEVANT DECISIONS OF THIS COURT CONFLICT WITH THE DECISION BELOW

Respondent's "unbroken line of Supreme Court cases," which purportedly "compelled" the decision below, is actually a roster of unrelated decisions involving actions where compliance with federal laws may have provided some defense to state-law actions. (Opp. Cert. 4). These are not cases of federal preemption, with one exception: *Avco Corp.* v. *Aero Lodge No. 735,* 390 U. S. 557 (1968). Respondent asserts that in *Avco,* the complaint "necessarily" plead a federal cause of action (despite the plaintiff's express disavowal of reliance on

federal law, *Avco Corp.* v. *Aero Lodge No. 735*, 376 F. 2d 337, 339 (6th Cir. 1967)), and was therefore properly removed (Opp. Cert. 5). This is true and it is precisely what occurred in this action. Notwithstanding respondent's similar attempt to disavow reliance on federal law, the complaint admittedly attempts to regulate the disposal of on-site wastes from an NRC-licensed facility which are "contaminated radiologically" (Opp. Cert. 2). Preemption renders this claim "necessarily" federal in nature.[1] Consequently, as in *Avco*, this case is removable under 28 U. S. C. § 1441.

II.

AN IRRECONCILABLE CONFLICT AMONG THE CIRCUITS EXISTS

Respondent argues that the conflict among the circuits demonstrated in the petition is an "illusion" and falls back on legal shibboleths, such as "implicitly overruled" and "anomaly," usually reserved for adverse cases which cannot be distinguished. (Opp. Cert. 5). The distinction which respondent uses to explain away the conflicting decisions of the courts of appeals is one between cases where the preemptive federal law afforded plaintiff a recovery and those in which it did not. This is respondent's distinction, not that of the courts of appeals, and it does not reconcile the obvious conflict. Plaintiff's right to recover should never determine the existence of federal jurisdiction. Moreover, as the respondent concedes (Opp. Cert. 6, 8), at least two courts of appeal have held that federal preemption affords a basis for removal when the preemptive law does not afford plaintiff a right of recovery on

[1] The court below assumed federal preemption here for purposes of its decision on removal jurisdiction and therefore did not have to review the district court's determination that the respondent's complaint is preempted. (A. 10-11).

its claim. *See Lafferty* v. *Solar Turbines International,* 666 F. 2d 408 (9th Cir. 1982); *North American Phillips Corp.* v. *Emery Air Freight Corp.,* 579 F. 2d 229 (2d Cir. 1978).

In the Ninth Circuit, the decision in *Lafferty* remains the most recent pronouncement directly on point, expressly approving removal based on federal preemption despite plaintiff's concession that federal law barred recovery in that case.

In the Second Circuit, *North American Phillips* continues to stand as the law of that Circuit, despite respondent's argument that *Vitarroz Corp.* v. *Borden, Inc.,* 644 F. 2d 960 (2d Cir. 1981) undercut *North American Phillips.* In *Vitarroz,* the court approved removal on other grounds, and did not even refer to federal preemption. 644 F. 2d at 964-65.

Respondent's characterization of the law in the First Circuit is inaccurate.[2] Preemption was not at issue on the removal in *Brough* v. *United Steelworkers of America,* 437 F. 2d 748 (1st Cir. 1971). (Opp. Cert. 6). Moreover, the most recent statement by the First Circuit emphasizes that the issue of federal preemption-based removal "is not easy" and "given this uncertainty" in the circuits (and the fact that the court did not have to decide the issue there), the First Circuit "preferred not to resolve [the conflict]." *First Federal Savings & Loan Ass'n* v. *Greenwald,* 591 F. 2d 417, 423 (1st Cir. 1979).

The respondent's resort to characterization, without explanation, of the conflict in the circuit court decisions is highlighted by its treatment of the more than thirty conflicting decisions in the last six years alone issued by more than twenty district courts (Pet. for Cert. 9-10). Respondent implies that the majority of these courts must be wrong but if there is "a

[2] The Fifth Circuit decision cited by the respondent (*Till* v. *Unifirst Fed. Savings & Loan Ass'n,* 653 F. 2d 152, 155 (5th Cir. 1981)) is similarly mischaracterized. (Opp. Cert. 7). It is not a preemption case at all. The court there simply affirmed jurisdiction of an action based on federal law.

problem" it should be remedied by the courts of appeals (Opp. Cert. 6). This ignores a fundamental purpose of certiorari jurisdiction which is to resolve such conflicts and provide guidance to the lower courts on significant jurisdictional issues.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit for the reasons stated in the petition for certiorari.

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